

INTRODUCTION TO COMPARATIVE GOVERNMENT

By

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PREFACE

This book endeavors to present the essentials of an introductory course in comparative government, through the use of a method which facilitates the making of significant comparisons. The material is considered topically rather than horizontally. Each basic problem of democratic government is discussed both in a general way with a view to clarifying underlying principles, and specifically by a presentation of the solutions adopted respectively in the greatest democracies of the world. So far as possible a similar method is employed in respect to problems of totalitarian government. Finally, the philosophy of democratic government and the philosophy of totalitarian government are compared point by point.

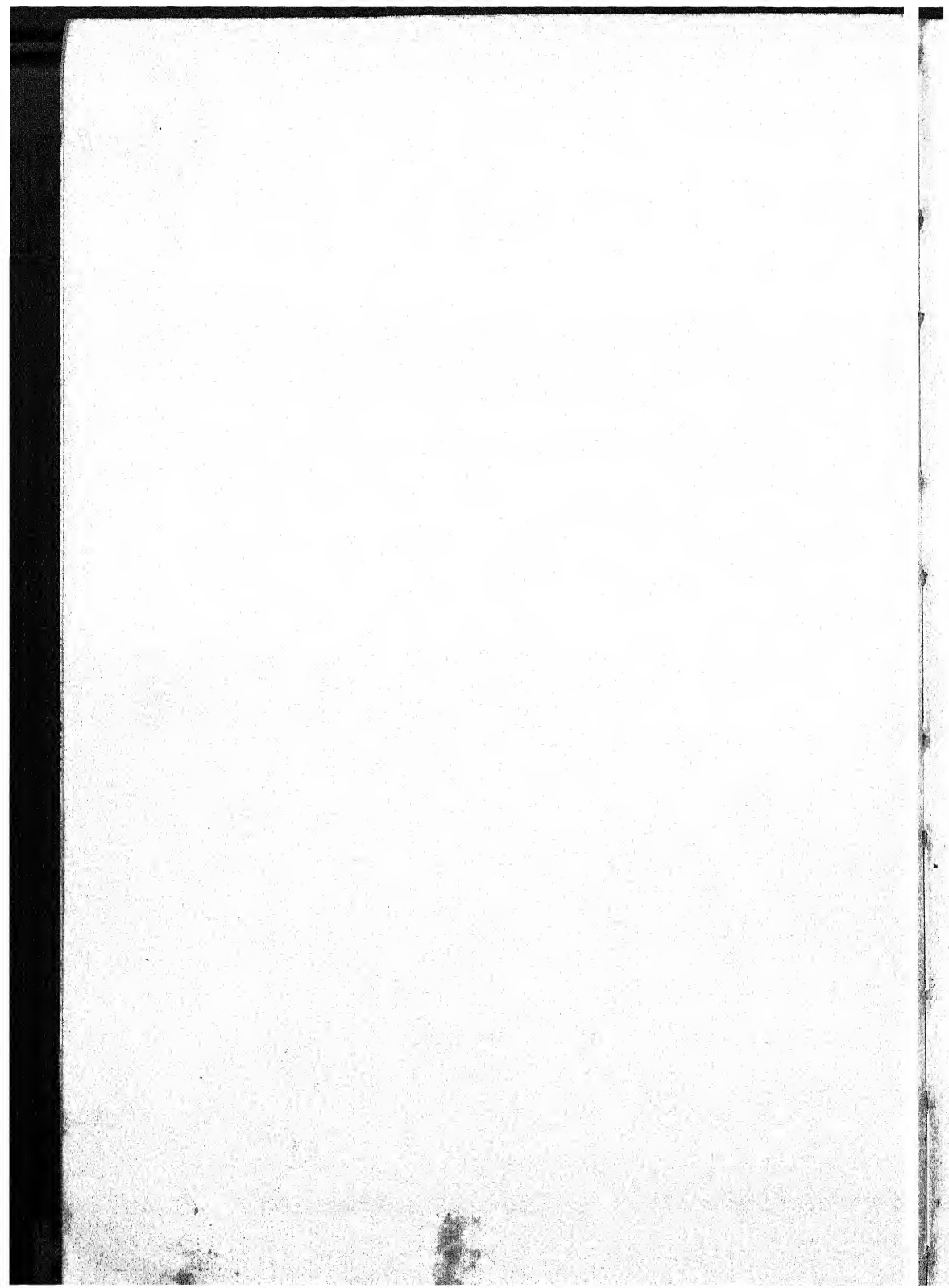
This method of presentation has been tested by the authors throughout several years of university teaching. It has aroused the interest of the students, has given them a grasp of principles as well as facts, and has helped them to consider systematically the essential phenomena of contemporary government. The authors are convinced that it can be used by other teachers with equally gratifying results.

A further advantage of the topical method is the fact that it stimulates supplementary reading. By contrast with the older descriptive method, it places side by side a number of different solutions to the same problem. The questions at once arise: Which solution is best? Why? The search for material that will contribute toward intelligent discussion of these questions must lead students to do extensive and varied outside reading.

In the preparation of this text the authors have been assisted by many suggestions from colleagues and other friends. Their heaviest debt of gratitude is owing to Dr. Rinehart J. Swenson and Provost Rufus D. Smith of New York University.

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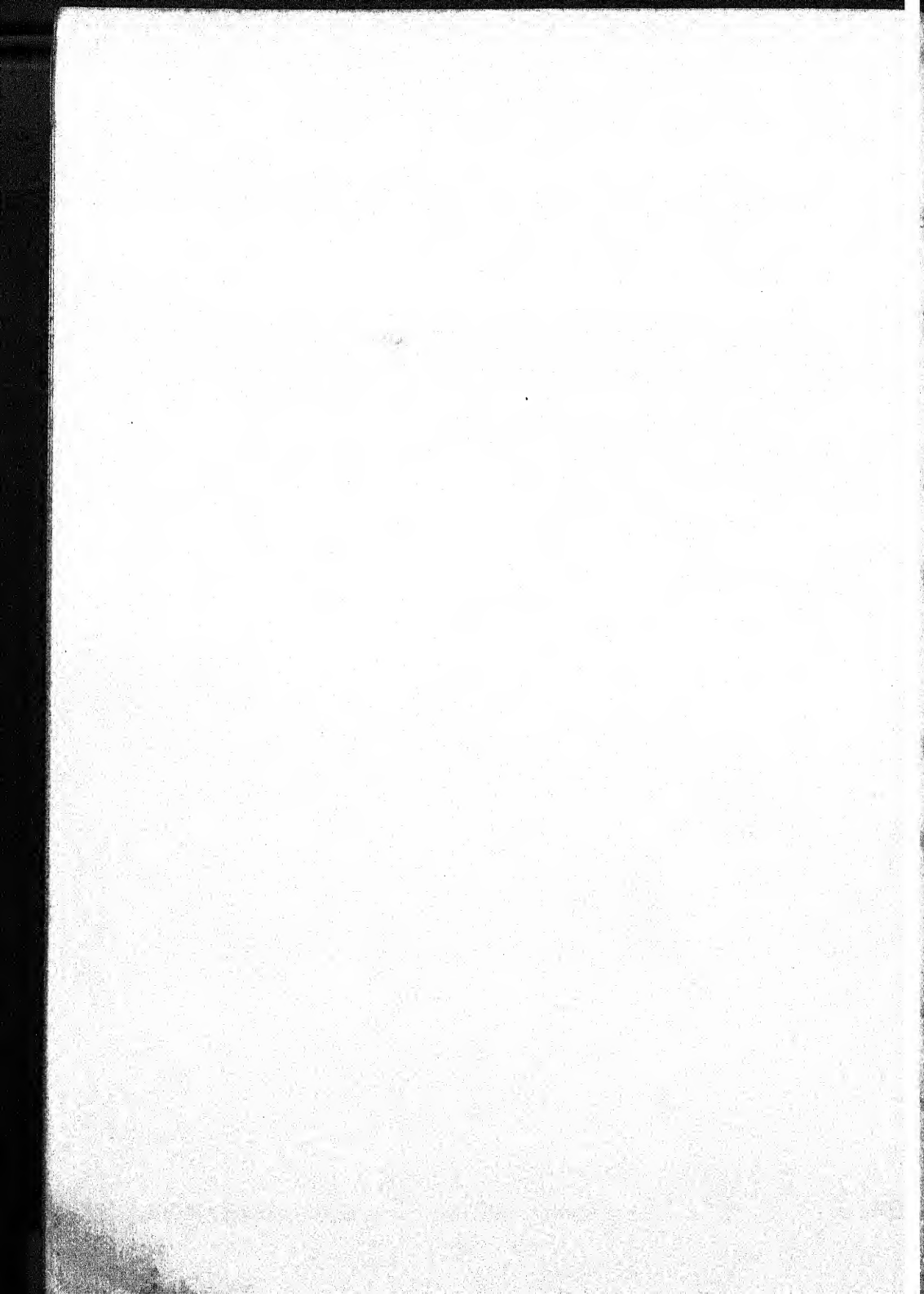
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**INTRODUCTION TO
COMPARATIVE GOVERNMENT**

CHAPTER I

HISTORICAL INTRODUCTION: THE DEMOCRACIES

Twenty years ago the great majority of students of government would have been in unanimous agreement upon one point: that representative democracy was the obvious culmination of political evolution. Within the past two centuries democracy had proceeded from one triumph to another. After the close of the war "to make the world safe for democracy," Germany became a republic and that old stronghold of reaction, the Austro-Hungarian Empire, was broken up into fragments, republics or limited monarchies, their constitutions inspired by the three classic examples: Great Britain, France, and the United States of America. It is true that Russia, after a series of political convulsions, had apparently accepted "the dictatorship of the proletariat"; but everywhere else democracy flourished, at least in outward form.

Although relatively few persons expected the Russian system to survive, it not only did so, but began to seem permanent. Then in Italy, Benito Mussolini began to gather power and followers by novel methods. A successful *coup d'état* placed him in a position to assume dictatorial powers, which he promptly did; and the world gazed upon the Fascist version of the totalitarian state.

Today there are in the world a number of dictator-led, totalitarian states, notably Italy and Russia, Germany, Yugoslavia, and Poland. The Czechoslovakian Republic, steadiest of the new democracies, has its "Nazi" threat. Even in the older democracies there are Fascist movements of more or less serious import. For Fascism, like the doctrines of the French Revolution, inspires its adherents with missionary zeal. Today, Mussolini could hardly repeat his dictum that Fascism is not an article of export. Indeed, there are many persons

who feel very pessimistic about the future of democracy and see it as an already outmoded form. For them the choice seems to lie between Communist and Fascist dictatorships.

The purpose of this book is to examine the organization of government in the three great democracies, France, Great Britain, and the United States, and in the three chief exemplars of totalitarianism, Russia, Italy, and Germany. Such an inquiry should enable the student to comprehend the principles underlying these antagonistic systems and to appreciate the reasons for this antagonism. The present chapter will set forth briefly the historical backgrounds of the six governments selected for intensive study.

Great Britain

Representative democracy in Great Britain is the result of a remarkably long evolution. For practical purposes we may say that this evolution began with the Norman Conquest. To be sure, William the Conqueror made no revolutionary changes. He simply completed a process which had already begun under the Saxon Kings. That is, he introduced a full-fledged feudal system, while retaining most of the existing features of Saxon local government.¹ It is noteworthy that these local institutions were fairly democratic above the level of the land-bound serfs. The town-moot (meeting) was attended by all freemen. The hundred-moot, covering several townships, included representatives from the townships, and the shire-moot, while mainly representative, was open to all the freemen of the shire. The business of these local bodies was chiefly judicial, and later they were to find themselves with little to do when the royal courts gained a near-monopoly of litigation. The democratic tradition in local government never died out completely, however, and served to keep alive in Englishmen a certain sturdy independence of central authority and a feeling for self-government.

Development, however, was destined to proceed along other

¹ See G. B. Adams, *The Origin of the English Constitution* (New Haven, 1920); C. W. C. Oman, *England Before the Norman Conquest* (London, 1910); F. A. Ogg, *English Government and Politics* (New York, 1936), 2d ed., Ch. I.

lines. In a word, the English Constitution is the result of the growth of central royal power down to the seventeenth century and then the transfer of authority to Parliament, which had been prepared for this eventuality by centuries of growth and experience.

William I, we have said, introduced a complete feudalism. It differed from its continental prototypes only in that William was a very strong King. The central concept of feudalism was that everybody in the hierarchy, from King to peasant, had his precise rights and duties in relation to those below as well as those above him. The feudal King, in theory, was merely a sort of super-baron who was strictly limited by traditional feudal law in what he might exact of his tenants-in-chief. In fact, many European monarchs found themselves unable to control the great dukes and counts who were their theoretical inferiors, whereas William was able, by a shrewd disposition of land grants, to ensure the relative powerlessness of most of his barons. At any rate, no single baron, and no group of several barons, ever gained enough strength to menace William. It would take the concerted action of the baronage to threaten the royal power. William was, in fact, strong enough to transcend the limits of his legal rights and make himself a powerful monarch at a time when the French Kings were little more than Counts of Paris. The latter, indeed, failed to subdue all the great nobles and gain real national authority until the seventeenth century. The early victory of royal authority in England and its postponement in France are of great importance in explaining the difference in the political evolution of the two countries.

For centuries, English Kings all attempted to strengthen and add to the mighty edifice of central authority whose foundations had been so well laid by William I. The more successful among them were those who sought to improve the machinery of national government, rather than those like John, who broke the law and openly defied the barons. Henry II (1154-1189) perhaps contributed more than any other King to the permanence of the central authority. In particular, Henry greatly extended the scope of royal justice. Before

his time royal officers had occasionally been sent into the counties to try unusual cases or to investigate acts of the King's ordinary representative, the sheriff. Henry now made this a permanent feature of the administration. Justices in eyre (itinerant judges) were sent off from Westminster on regular circuit, so that the litigant who wished to do so might have his case decided by royal judges instead of by the local or feudal courts. These judges "sold a better brand of justice" than their competitors. They generally used a jury of sworn witnesses and always gave judgment on a basis of common sense and common custom instead of depending upon the archaic trial by ordeal or battle. As they grew in importance the other courts dwindled, and in time royal judges were able to establish the "King's peace" and the common law throughout the length and breadth of England.

Henry also made better use of the office of sheriff than his predecessors. He deliberately chose for this position members of the lesser nobility whom he could control, and put them in charge of the "general levy" or militia. He encouraged the great nobles to make money payments, "scutage," in lieu of personal military service. Altogether, Henry was building up a centralized government, unusual in a feudal society, and doubly notable as based upon law rather than upon mere military power. Least successful was his attack upon the independence of the Church, which led to the martyrdom of St. Thomas à Becket.

Henry's sons, Richard and John, did nothing to further their father's work. John, indeed, so antagonized the barons by unusual exactions that he was finally unable to withstand the concerted action of almost the entire baronage, and was compelled to have his great seal affixed to *Magna Carta* (The Great Charter of Liberties) in 1215. This was not the first charter in English history. Henry I (1100) in his coronation charter had promised to keep feudal law. The theory that the King is under the law was as old as feudalism, but Henry was the first English King to give a written pledge of this sort—a pledge which, incidentally, he did not keep. *Magna Carta*, however, was more complete in its provisions, and contained

the very remarkable novelty of a provision for ensuring enforcement.²

Magna Carta has been called "the bulwark of British liberties" numberless times, but it has also been called "the most reactionary document in British constitutional history." In a sense, it is both. It contained a few chapters of interest to every freeman in England, but for the most part it guaranteed only the rights of the barons who devised it. Taking a broad view of history, the baronage had to be weakened and the king had to become nearly absolute before the concentration of power could be inherited by Parliament. In so far as Magna Carta was an attempt to delay this process it was reactionary. Later, after the Wars of the Roses and the Tudors had destroyed the medieval nobility and the struggle had become King *versus* Parliament, Magna Carta became the stirring battle-cry of the parliament-men who were able, in the history of its many confirmations, to show that English Kings had never been above the law.

How, then, did Parliament develop? Why did the English Kings raise up an institution that was to be their undoing? Certainly, this was never their intention. The Saxon Kings

² Magna Carta is divided into 63 Chapters (sections). Chapters II to XVI were to protect the tenants-in-chief (barons) from unusual services and payments to the King, except Chapter XIII which guaranteed the ancient liberties and customs of London. Chapter XII declared that no scutage or aid should be levied by the King in addition to the three ordinary feudal aids, except by consent of the general council of the nation (*The Magnum Concilium*). This protected the barons only, but it was the need for more revenue and the necessity of getting it by consent which led to the growth of Parliament. Chapters XVII to XL dealt mainly with judicial abuses. The famous Chapter XXXIX is as follows: "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." Chapter XL: "To no one will we sell, and to no one will we refuse or delay right or justice." Chapter LXI provided for the committee of twenty-five barons who were empowered to enforce the charter provisions if the King or his officers neglected them, by seizing royal lands or in any other way.

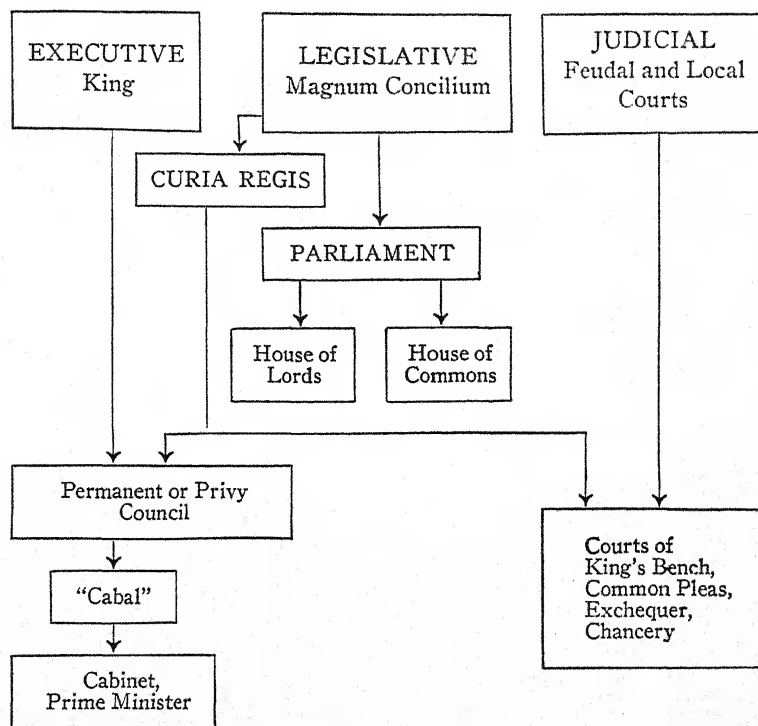
The definitive work on Magna Carta is, W. S. McKechnie, *Magna Carta; A Commentary on the Great Charter of King John* (Glasgow, 1905). The text in English is in, G. B. Adams and H. M. Stephens, *Select Documents of English Constitutional History* (New York, 1906), pp. 42-52. A good short article is, A. W. Holland, "Magna Carta," *Encyclopaedia Britannica* (11th ed.), Vol. XVII, pp. 314-318.

had had their Witenagemot to consult and the Norman Kings their Great Council. So similar in functions were these bodies that the English chroniclers sometimes called the newer body by the Saxon name. This Council was made up of the great men of the kingdom, the tenants-in-chief (barons), but it also included the officials of the royal household, who were often not barons but clerks (churchmen) or men of humble origin whom the King had found useful. It is from this *Magnum Concilium*, by a long and complicated series of changes, that almost the whole system of modern English governmental institutions has developed. This development was not the result of careful planning, but rather of changes, often grudgingly made to suit altered circumstances, which changes led to others and at last to institutions never foreseen in the beginning. This process is difficult to describe simply and yet adequately. Perhaps the chart on page 9 will help the reader to trace the lines of growth.

The first stage in this great evolution was the differentiation between the large meetings of the King's Council, held usually thrice a year, and the interim meetings attended generally only by the King's household officers. In a sense, there was no distinction between these bodies. Both were the *Curia Regis*: the smaller and more professional body as well as the larger meeting to which were summoned all the great barons. Both were capable of performing the judicial business which was the chief work of the *Curia*. Nor was the *Curia* purely feudal. Edward I by 1305 included judges and non-baronial officials. Then gradually a distinction was made between judges and barons. The former lost their voting power in the Council. By the time of Edward III (1346) this change had become well established. So we observe the *Curia* splitting into what was to become the House of Lords on the one hand, and the Law Courts on the other.³

³ On the evolution of Parliament see: A. F. Pollard, *The Evolution of Parliament* (London and New York, 1926); C. H. McIlwain, *The High Court of Parliament and Its Supremacy; an Historical Essay on the Boundaries between Legislation and Adjudication in England* (New Haven, 1910); H. J. Ford, *Representative Government* (New York, 1924), Pt. I.

CHART TO INDICATE THE WAY IN WHICH THE ENTIRE
GOVERNMENTAL STRUCTURE EVOLVED FROM
THE GREAT COUNCIL



In the year 1295, Edward I summoned to Westminster his famous "Model Parliament." It consisted of about 400 persons, of whom over half were representatives of the country gentry (knights of the shire) or of the towns (burgesses). It has been said that Edward's great contribution was the amalgamation of the three estates and Parliament rather than the inclusion of the lesser nobility and the burgesses. Had the three estates (nobility, clergy, and commons) remained separate it is likely that English development might have paralleled

that of France, with the clergy and nobles combining to nullify the efforts of the burgesses. What happened in England was: first, the withdrawal of the minor clergy to their separate "convocations" and the identification of the bishops and abbots with the nobles in the *Curia* (where they belonged as tenants-in-chief); second, the combining of the lesser nobility (the representative knights of the shire) with the burgesses in what was to become the House of Commons.⁴

Why Parliament at all? Because the King wanted money. The ordinary feudal "aids" and "scutages" had become insufficient for the needs of an expanding monarchy. Wiser than John, Edward sought to get the needed funds by persuasion rather than force. He therefore called not only the great nobles of *Curia* but representatives of the well-to-do gentry and the wealthy town merchants in order to gain their consent to extra taxation.

It is very interesting to note that Parliament became a law-making body only, as it were, incidentally. The Common Law was supposed to be generally binding, not because of Parliamentary enactment, but because it had the force of immemorial custom. The King could make laws, of course, but he very rarely interfered with the law of the land. His interest was in taxes and administration. The knights and burgesses who went unwillingly to Westminster in the fourteenth and fifteenth centuries to give their grudging assent to new taxes, acquired the habit of taking petitions with them for the King's consideration. A wrong righted would be some repayment for their time and trouble. It was found that some of the wrongs were general rather than individual and that the knights and burgesses might sometimes pool their petitions and by the mouth of their "Speaker" present a general petition to the King, who could hardly afford to ignore it if he wanted quick action on his request for supplies. So arose the legislative power of Parliament, wrested from the King by the "power of the purse," with its maxim "no supply before redress" and the corollary, "no taxation without representation." Before the

⁴ Note that this word refers to *Communes* or communities, not to any ignoble status of its members.

end of the fifteenth century the Commons had become an integral part of the law-making machinery.⁵

The Wars of the Roses practically destroyed the old mediæval nobility, and the destruction was completed by the Tudors who created practically a new aristocracy of their own supporters. Henry VIII enriched these "new men" out of the spoils of the monasteries, so that many a noble earl or duke today has for his chief residence an "abbey." Naturally the peerage was subservient to its royal benefactor, and the House of Commons was hardly less so. For the Tudors were careful to "manage" elections, to retain obedient Parliaments for years, and quickly to dissolve those likely to prove stubborn. Nevertheless, England was prospering. There was no ideology of self-government. So long as trade was expanding and the Tudors gave vivid personification to the Englishman's newly aroused feelings of nationalism, the dynasty remained popular and Parliament ceased to be the focus of general interest.⁶ Also the Tudors were too sagacious to arouse needless animosity, and were always careful to keep the outward forms of respect for law and Parliament. Especially was this true of Elizabeth, who found her Parliaments less biddable than had been those of her father and grandfather.

But the monarchy seemed secure and powerful when James I of the Stuart line ascended the throne. Never had the King appeared to be a greater figure, and surely no King of England had ever taken his position and power more seriously. James believed that Kings ruled by divine right.⁷ His consistent attitude is expressed in the following quotation: "That as to dis-

⁵ This right was developed under Henry VI who began his reign as an infant in 1422. See statute (1423), 2 Hen. VI ("Confirmation of Liberties"), cited in part in *Halsbury's Statutes of England* (London, 1929), Vol. III.

⁶ The Tudors made much use of their Privy Council (offspring of the *Curia Regis*) consisting of trusted advisers. The Council put forth several new judicial branches of an arbitrary character—such as the Court of the Star Chamber (Henry VII) and the Court of High Commission (Elizabeth). The Privy Council handled legislative and administrative business so that Parliament was mainly useful to give an appearance of national participation.

⁷ Before succeeding to the English throne James wrote a treatise on divine right, *The True Law of Free Monarchy*. This is described in W. A. Dunning, *A History of Political Theories from Luther to Montesquieu* (New York, 1905), pp. 215-216. See also J. N. Figgis, *The Theory of the Divine Right of Kings* (Cambridge, 1896).

pute what God may do is blasphemy: . . . so it is sedition in subjects to dispute what a King may do in the height of his power."⁸ This is from his speech to Parliament in 1610. Unfortunately for James this doctrine was novel and distasteful to Englishmen who had not forgotten Magna Carta. It was particularly distasteful to the anti-authoritarian Puritans who were increasing in numbers. Furthermore, Tudor prosperity was waning. The King himself with his Scottish accent seemed more foreign than English. No less propitious time could have been chosen to try to inculcate the doctrine of divine right. The continuance of James's ideas and policies by his son, Charles I, led to the Civil War and the execution of the King.

When William and Mary ascended the throne in 1689 they did so at Parliament's invitation and they ruled by a parliamentary title. The struggle was over. Never again could an English King defy the clearly expressed will of Parliament. The parliamentary leaders made sure that the new sovereigns would remain subservient to Parliament by having them agree to a "declaration of right" which was subsequently enacted as the Bill of Rights.

This famous Act of Parliament specifically forbids as illegal the various abuses of power which were especially employed by the Stuarts; such as the suspension of laws, the levying of taxes without Parliament's consent, the raising of an army without parliamentary permission, and the like.⁹ Personal liberties are also guaranteed by it, as the right to petition, and to bear arms in one's own defense. Parliamentary liberties of speech and debate are secured, as are "free" elections. In brief, the Bill of Rights is one of the most important documents of the British Constitution, for it sums up the results of the Civil War and the "glorious Revolution" of 1688 by its guarantee of parliamentary supremacy.¹⁰

⁸ Dunning, *op. cit.*, p. 217. Quoted from G. W. Prothero, *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I* (Oxford, 1898), p. 294.

⁹ The text of the Bill of Rights is in Adams and Stevens, *op. cit.*, pp. 462-469. Extracts from it are found in N. L. Hill and H. W. Stoke, *The Background of European Governments* (New York, 1935), pp. 8-11.

¹⁰ The parliamentary nature of the king's title to the throne was further emphasized by the Act of Settlement (1701) which provided that in case

It must not be supposed, however, that English democracy dates from 1689. For Parliament remained under the control of a small aristocratic class. The ultra-democratic ideas of some of the Puritans or rather the "Levellers" of the Civil War period were in advance of their time and had fallen on barren ground. The great apologist of the glorious Revolution was John Locke (1632-1704) whose writings were very influential not only in England but also in France and in the American colonies. Locke was a Whig, that is, a believer in parliamentary supremacy, constitutional government, and the end of government as the protection of personal natural rights of life, liberty, and, in particular, property. This seems familiar doctrine to American readers, for indeed the United States Constitution was founded upon just such dogmas.¹¹ His theory, in brief, was that men are naturally good and possess the natural rights mentioned above. Government is called into existence because it is convenient to have a general police power to see that these rights are preserved rather than to have every man act as his own policeman. Government, therefore, has no rights of its own, is not an end in itself, but exists rightfully only so long as it carries out its proper function. If it fails to do so, men have a right, even a duty to rebel. He defended majority rule, which meant, in practical English application, the majority of the small propertied class of parliamentary voters. He was also an eloquent defender of religious toleration and freedom of thought.¹²

True representative democracy was not achieved until two developments had taken place: the rise of the party system and the broadening of the suffrage. Factions had existed, of course, in all political struggles. Even King John had his

William or Anne failed to leave heirs, the succession should remain in the Princess Sophia "and the heirs of her body, being Protestants." This deliberately skipped intervening Catholic heirs and ensured the succession of the Hanoverian line.

¹¹ Locke helped to draw up the original constitution of Carolina.

¹² The most easily obtainable good edition of Locke's political writings is John Locke, *Two Treatises of Government*, edited by W. S. Carpenter, Everyman's Library (London and New York, 1924).

See also W. A. Dunning, *op. cit.*, Ch. X, and T. I. Cook, *History of Political Philosophy from Plato to Burke* (New York, 1936), Ch. XIX.

friends among the barons. The Wars of the Roses divided the English nobility into two parties. The Civil War divided the majority of all Englishmen into two hostile camps. But political parties in the modern sense, groups *striving for power by peaceful means* and *tolerant of the opposing party in victory or defeat*, did not appear until the eighteenth century. All the conditions of this definition, except mutual tolerance, were met by the Whigs and Tories of the late Stuart period. The Glorious Revolution was a Whig triumph, and William found it easy to work with the Whig leaders but very embarrassing in the latter part of his reign to have to accept Tory ministers. The Tories indeed were hardly regarded as loyal subjects of the new dynasty until near the end of the eighteenth century. It took at least sixty years following the Revolution of 1688 for the Whigs and Tories to become true political parties, both striving to control a majority of the votes in Parliament but both loyal to the King.

While true political parties were evolving, a parallel and equally important development was taking place. This was the emergence of the Cabinet system. The Glorious Revolution did not destroy the monarch's executive power completely. His choice of ministers was far from automatic. The royal veto of legislation lasted until the reign of Queen Anne, who employed it for the last time in 1707. If Parliament were to be really supreme it was obvious that the royal check would have to disappear and the royal executive power become purely nominal. This, of course, is what happened, and the real executive became, in time, the King's ministers who had the confidence of Parliament. This evolution was indeed an extended process if we care to trace it back to the medieval *Curia Regis*. Kings had always been compelled to rely for advice upon ministers or favorites. For centuries Parliament had no check upon these except at times the clumsy devices of impeachment and attainder. Charles II had employed a small select group of Privy Councillors to give him advice and to look after his interest in Parliament. This group, nicknamed the "Cabal" (from the initials of its original members) was regarded with suspicion as a body of intriguers in the royal but not the public

interest. Indeed, in the Act of Settlement (1701) were provisions devised to prevent the Cabinet system from developing. Fortunately these provisions were repealed before they went into effect, and during the reigns of the first two Georges it became entirely customary for the executive business of the Crown to be handled by Whig ministers who were at the same time parliamentary leaders. The King ceased to attend Cabinet meetings and the ministers began to regard themselves as responsible to Parliament. The evidence of this was given by Sir Robert Walpole, generally considered the first Prime Minister in the modern sense, who resigned in 1742 as soon as he lost majority support in the Commons. This act was approved by all, and was copied by Walpole's successors.

In retrospect the Cabinet system seems to have been almost completely developed under Walpole, but observers of the time did not comprehend it. Montesquieu did not, nor did the framers of the United States Constitution. But the system had become so well established by the time of George III that neither he nor his discredited son George IV could destroy it. William IV, Victoria, and Edward VII accepted it without question, as did George V. An interesting point in connection with the recent abdication of Edward VIII is that the young King apparently never questioned his position of subordination to ministerial advice. Finding himself unable to accept it *he* resigned, not the ministry.

Nowadays, then, the executive in Great Britain is the collective ministry, or rather that smaller body of the more important ministers called the Cabinet. These men are chosen for office by the Prime Minister and must, in the final analysis, agree with his policies or resign. The Prime Minister is normally the leader of the largest party in the House of Commons, or at any rate one who can command a majority in that House. He is chosen by the King who acts here almost automatically, especially now that the parties themselves choose their leaders at official party congresses. The ministry as a whole is responsible for general policy and must resign upon losing the confidence of the House of Commons. The King must always accept the advice of his ministers. Here in brief are the main

points of the Cabinet system which is the heart of the British governmental plan.¹³

But eighteenth-century England was no democracy. True, prime ministers were frequently commoners, like Sir Robert Walpole; and the House of Commons gradually replaced the Lords as the center of legislative activity. But the Lords remained for long the more important House, and the great landed proprietors in the peerage controlled the election of many members to the Commons until 1832. This was due in part to the archaic election district plan, which denied representation to many new towns and cities while retaining it for extinct boroughs occupied only by a few tenants ready to vote as directed by their noble landlord. The members of the House of Commons, therefore, were wealthy men for the most part, the chosen representatives not of the people but of the man who "owned" the seat, or at best, of the few well-to-do voters. Fortunately for England the men who bought or inherited their seats in Parliament were frequently not without talent and a serious sense of responsibility.¹⁴ They gave England an aristocratic and upper middle class government but a good one of its kind.

The franchise in the early nineteenth century was in serious need of reform. The Industrial Revolution made a system based on feudal tenures ridiculous. There were four different classes of votes in the boroughs; nor were the poor alone disfranchised. The wealthy merchants and manufacturers of Manchester, Birmingham, and Leeds chafed under a system which gave them merely a share in the election of two county members. The lower middle class now had schooling. Its members could read the works of Bentham, Mill, and Cobbett. So when the Whigs under Earl Grey took up the question of parliamentary reform they were sure of two things, the backing of the English people and the whole-hearted opposition of the

¹³ See E. R. Turner, *The Cabinet Council of England in the Seventeenth and Eighteenth Centuries, 1622-1784* (Baltimore, 1932); G. B. Adams, *Constitutional History of England* (New York, 1934), rev. ed., Chs. XV-XVI. A good short textbook treatment is found in Ogg, *op. cit.*, Ch. II.

¹⁴ See P. Guedalla, *Wellington* (New York, 1931), pp. 30-33, 128-129, for a lively account of electioneering in Ireland and England.

Tory majority in the Lords. This opposition was finally overcome by the King's reluctant promise to create enough new peers to pass the bill, and in 1832 the Great Reform Bill became law. The franchise was still based upon property and the really poor were not yet given the vote, but the "rotten boroughs" were eliminated and representation was made far more equitable.

The reformed Commons set about enacting a series of overdue improvements in education, factory conditions, the poor laws, etc., and in 1867 the franchise was again extended by Disraeli's Reform Act to include upwards of one million new voters, more than doubling the electorate. Until 1832 the great landlords ruled Parliament. From 1832 to 1867 the well-to-do urban middle class had the balance of power. After 1867 the working class was a factor in government. The franchise was again extended, after a struggle with the Lords, in 1884, to include many farm workers, the new Act adding about two million voters. Even yet, however, the franchise was not truly democratic. Men were excluded who could not qualify as occupants of dwellings or business buildings, or as lodgers. On the other hand many people with freehold property in various boroughs and counties had a vote in each of these places. The Liberals attempted to destroy plural voting in 1906 but the bill was defeated in the Lords. Finally in 1918 a Representation of the People Act was passed which introduced an almost universal suffrage, including the vote for women, and raising the electorate from less than nine to more than twenty-one million. At the same time plural voting was limited although not abolished and a complete redistribution of seats was made, according to population.¹⁵ Political democracy was now virtually complete.

The nineteenth century may well be regarded as the century of reform in government. Not only were there the several extensions of the franchise, but many other needed reforms

¹⁵ This Act was rounded out by two later measures, an Act permitting women to sit in the House of Commons and the Equal Franchise Act of 1928. The extraordinary history of the women's suffrage movement is recounted in entertaining detail in G. Dangerfield, *The Strange Death of Liberal England* (New York, 1935), pp. 139-213.

found attention at the hands of Liberal and even Conservative governments. In 1873 and 1876 important Acts were passed to amend and rationalize the antique system of law courts. Equity and Common Law were consolidated and a strong appeal court was set up, with the House of Lords retained as a final court of appeal. In 1870 an Order-in-Council adopted almost entirely the reform proposals which Sir Stafford Northcote and Sir Charles Trevelyan had made nearly twenty years earlier regarding the Civil Service. The system of competitive examinations open to all comers, to fill places in the Indian Civil Service, had been adopted in 1853. It was now extended to the home services as well, except for the Foreign Office and the Diplomatic Service. Intelligent personnel administration, good salaries for the higher positions, the social prestige of government employ, combined to produce in a few decades what is probably the best and least hide-bound Civil Service in the world.

In conclusion, we should note the final change which was needed to complete the democratization of the British Parliament. By the end of the nineteenth century the House of Lords was a dwindling force in government. During Conservative administrations it hardly stirred. Enormous in membership, its sessions were attended regularly by about twenty peers. Only when the Liberals controlled the Commons did it act to veto bills. By long custom, however, it accepted money bills from the Commons even if distasteful. The Liberal regime of 1906 found itself faced by a House of Lords apparently determined to prevent reform, and one after another its most important measures were vetoed without ceremony in the upper chamber. Finally the Lords broke with tradition and refused assent to the Lloyd George Finance Bill in 1909. There followed a long struggle, complicated by the death of King Edward VII, resulting at last in the Parliament Act of 1911, which removed the Lord's veto completely in the case of money bills and made it suspensory in other matters. Any bill, not a money bill, passed in three successive sessions of Parliament by the House of Commons becomes law without the Lords' assent, a period of not less than two years elapsing

between the second reading in the first session, and the final passage. The Lords still have a power which they use freely to compel amendments, as the device for overriding their veto is obviously very cumbersome. The future of the Lords is problematical. A strong Labor government might be tempted to destroy it completely. It remains a distinctly anachronistic and illogical feature of the British democracy.¹⁶

The United States

Much that has been said in the above section about British democratic development applies with equal force to the United States. The American colonists who resisted British imperialism were as well able to quote Magna Carta as were the British who had fought with Cromwell. Several of the colonial governments were modeled after the English plan. A royal governor stood for the King and managed affairs with the aid of an appointed Executive Council, in some respects equivalent to the House of Lords, and a Legislative Council or Assembly like the House of Commons. The long pre-revolutionary struggle between Governor and Assembly in Massachusetts reminds one vividly of the England of Charles I. The colonists thought of themselves as Englishmen fully endowed with all the rights of English freemen. The cry of "no taxation without representation" was one which they could raise against the eighteenth-century Parliament as that body had used it against seventeenth-century Kings. Nevertheless, it must not be supposed that all Americans were thorough democrats during the revolutionary period. Nor were the colonies or the early States purely democratic in structure. Property qualifications for voting persisted and in parts of New England church membership was necessary. Of course the absence in most of the colonies of anything like a stable landed aristocracy precluded an imitation of English class government; but it did not prevent the more substantial citizens, whether planters or mer-

¹⁶ See A. L. P. Dennis, "Impressions of British Party Politics, 1909-1911," *American Political Science Review* (November, 1911), Vol. V, No. 4, pp. 509-534; "The Parliament Act of 1911," *American Political Science Review* (May, August, 1912), Vol. VI, Nos. 2, 3, pp. 194-215, 386-408; Ramsey Muir, *Peers and Bureaucrats* (London, 1910); G. Dangerfield, *op. cit.*, pp. 3-68.

chants, from dominating the colonial governments and society. It was these classes who first found fault with English laws and began the agitation that led eventually to the revolution.

Their arguments were derived almost entirely from John Locke. They believed in a "state of nature" and the establishment of government by a social compact, in the doctrine of natural rights which government is bound by the compact to protect, and in the right of revolution if those rights are violated. All this is pure Locke. His inspiration of the Declaration of Independence is obvious, and his theories suited perfectly the needs of the rebellious colonists.¹⁷ Jefferson, of course, was the author of the Declaration, but he claimed no originality for its ideas. It remains perhaps the clearest of all statements of the revolutionary position. All men are born free and equal; they have inalienable rights to life, liberty, and the pursuit of happiness. Governments derive their powers from the consent of the governed. Failure of government to protect individual rights justifies revolution. It is interesting to note that Jefferson substituted "pursuit of happiness" for the more usual "property" of the Lockean formula. He was more interested in personal than in property rights.

This was certainly not so true of the men who met at Philadelphia to devise a federal Constitution. They did not take the Declaration so literally as to find it incompatible with the institution of Negro slavery or the establishment of property qualifications for voting and office-holding. Indeed, many who were fiery democrats in the struggle with George III were sturdy conservatives after the war was over. In his early days, Hamilton wrote feelingly of the "sacred rights of mankind."¹⁸ Later he was more concerned to establish the rule of the "rich and well-born." The Constitution was a conservative triumph.¹⁹ Led by John Adams and Alexander Hamilton, the "Federalists," as their party came to be called, saw as the great necessities

¹⁷ For quotations showing Locke's influence in the writings of prominent patriots see C. E. Merriam, *A History of American Political Theories* (New York, 1906), pp. 90-91.

¹⁸ Quoted in Merriam, *op. cit.*, p. 48. See also pp. 99ff.

¹⁹ See C. A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York, 1913).

a strong central government and a curb upon a possibly dangerous democracy. Opposing them was Thomas Jefferson, the consistent idealist of democracy. In the struggle between the Jeffersonians or Republicans and the Federalists was the germ of the American party system.

The fundamental ideas underlying the Constitution may be described as those of a conservative democracy. Democracy was provided for in the arrangement concerning Congress: one House was to be popularly elected and the other chosen by the State legislatures, which were in turn the choice of the electorate. The President, however, was to be chosen by a free deliberative body of wise men elected for that purpose. English precedents had now ceased to be abhorrent, and Montesquieu's admiration of the British system, based, as he thought, upon its separation of the powers of government, was shared by the "Fathers." This doctrine held that neither executive nor legislature is to be trusted with all the power of government. Each should have its own peculiar work to do and in addition each should act as a check upon the other, with the further provision of an independent judiciary to protect individual rights. It is clear that the revolutionary faith in legislatures and distrust of executives had undergone a change. Taken together with the restricted suffrages in the component States, which the Constitution left untouched, these provisions set up a democracy, but one in which the very poor were excluded from the franchise, and in which the popular legislature was checked by both the executive and the Constitution.

The clauses dealing with the division of authority between the national and State governments satisfied a general demand for a national government of strictly limited powers. No other would have been acceptable to the smaller States, jealous as they were of their newly won independence. In addition they demanded the first ten amendments, the Bill of Rights, which was added immediately to the original document and, in a sense, forms part of it. The Bill of Rights contains a summary of many of the ancient rights of Englishmen garnered through centuries of struggle and here set down to limit not only tyrannical executives but possibly tyrannical majorities in control

of the legislature. The original document had, indeed, forbidden the enactment of *ex post facto* laws and of bills of attainder by both national and State legislatures, and States were further forbidden to impair the obligation of contracts. The writ of *habeas corpus* was declared inviolable except in case of suspension during rebellion or invasion. The Bill of Rights further guaranteed to the individual free exercise of religion, free speech, free press, free assembly, the right to petition, the integrity of domicile against arbitrary searches and seizures by officials, the right to security in life and property unless by due process of law, and the right to trial by jury.

It is to be noted that the above guarantees were directed against the national government only, although all the States subsequently adopted in their own constitutions similar Bills of Rights.

The Bill of Rights of the federal Constitution is responsible for giving that document its sacred character. The tradition of inalienable natural rights has persisted in America, and the Constitution is regarded as their shrine and their guardian. It should be noted that the recital of these rights in the document does not automatically guarantee their enjoyment. No law is self-executing; and in certain times and places, where the political climate has been unfavorable, these rights have temporarily been disregarded in practice.

But worship of the Constitution as a symbol has persisted. Most Americans feel that the preservation of the Bill of Rights without serious change is the best protection against despotism both of executives and temporary legislative majorities.²⁰

The period between the adoption of the Constitution and the Civil War saw the tremendous expansion of the American frontier and a vast growth in national wealth. It saw too the development of Jacksonian democracy with its rude insistence upon the virtues of the common man, and its unblushing acceptance of the "spoils system" which regarded public office as the

²⁰ See Horace Taylor and others, *Contemporary Problems in the United States* (New York, 1935), 1935-1936 ed., Vol. II, Ch. VI; E. S. Corwin, "The Constitution as Instrument and Symbol," *American Political Science Review* (December, 1936), Vol. XXX, No. 6, pp. 1071-1085; T. W. Arnold, *The Symbols of Government* (New Haven, 1935).

proper reward for party loyalty. At length the tension between North and South focusing upon the slavery issue led to the formation of the Republican Party in 1854, the victory of Lincoln, and the Civil War.

The Northern victory resulted in an increase in political democracy. The Thirteenth and Fifteenth Amendments to the Constitution abolished slavery and racial qualifications for the suffrage, although it should be noted that the Fifteenth Amendment is successfully nullified in practice in some Southern States. The Fourteenth Amendment made citizenship a national matter not touchable by the States and extended the protection of "due process of law" and "equal protection of the laws" to all persons as against State governments.

Since the Civil War many interesting developments have taken place in connection with the democratic process. Popular education increased tremendously during this period. Communities began to take immense pride in their schools and to spend freely in order to have the best available provision of free education for all children. This idea was extended in some States to the provision of free or nearly free higher education in State universities.

Electoral reforms have also been numerous. These have been necessitated in most cases by the development of political parties and the perfection of the party "machines." "Practical" politicians who sought to control election for personal ends, the control of patronage, graft in connection with public utility franchises, and the like, soon found that large numbers of voters could be managed, sometimes by direct bribery and intimidation. This was possible under the old system of "open" or *viva voce* voting and even after the ballot was used so long as the parties printed their own ballots of distinctive colors and distributed them at the polls. Since 1890 there has been a general adoption of the Australian ballot, printed at public expense and given to the voter inside the polling place so that his vote is secret. Because of the secret ballot and better administration of laws to control corrupt election practices, the party machines rely nowadays more generally upon distribution of small favors, the "glad hand," political clubs and so on.

rather than upon the cruder methods of an earlier day. Again, there is a movement in some localities favoring the use of direct democratic devices, the initiative, referendum, and recall. Another device of almost universal adoption is the direct primary method of nominating party candidates. It must be admitted, however, that the above reforms have done little to check the control of elections by irresponsible party "bosses" especially in States and municipalities. The root problem of democracy, how to secure the active and intelligent participation in government of a large number of well-informed voters, is not solved by any electoral device.

The period under consideration also saw the addition to the Constitution of the Seventeenth Amendment, providing for the direct election of United States Senators by the people. Senatorial opposition to this amendment had finally dwindled with the increase in the use of the direct primary for senatorial nominations, which really amounted to direct election as the State legislators of the successful party felt obliged to ratify the choice made in the primaries.

Then, in 1920, the Nineteenth Amendment placed women on an equality with men as regards the vote. This was the result of long and, at times, turbulent campaigns in favor of the reform. It was followed by a great increase of women in public office, both appointive and elective.

In summation, we may say that since the Civil War there have been many very necessary administrative reforms in government together with a vast increase in the efficiency of party machines and a corresponding series of experiments in the circumvention of the machine in order to secure genuine political democracy. At the same time there has been growth of what Professor Beard called "invisible government." The great financial, business, and mercantile associations have found it advantageous to control many governmental activities such as the tariff and have done so not by open defiance in most cases, but by financial support of parties and candidates favorable to their interests. In recent times there has been an increase of organized pressure groups of a different sort, such as the American Legion, the American Federation of Labor, the

C. I. O., the "Townsendites," and others. Some of these groups are ephemeral; others represent what seems to be a permanent trend toward minority control of particular issues upon which there is apparently no active and universal public opinion.²¹

France

In the discussion of British governmental evolution the early development of strong centralized monarchy was noted. A similar development did not take place in France until the seventeenth century. A powerful feudal nobility and religious and dynastic wars prevented the French Kings from imitating their neighbors across the Channel. When at length royal power triumphed, the victory was only too complete. The French Kings became absolute in a degree never approached in England. They were not dependent upon voluntary grants for revenue. Meetings of the three Estates, the churchmen, nobility and middle class, might conceivably have developed into something like the English Parliament; but this did not happen, because the King was normally independent of them, and because upon the rare occasions when they did meet the First and Second Estates (clergy and nobles) were able to outvote the Third (the burgesses). The old regime at its height saw the King elevated to an almost divine position, the nobility reduced to the status of courtiers or sinecure-holding parasites, and the enormous costs of maintaining a top-heavy army and bureaucracy borne by the middle and lower classes. The Church was untaxed and the nobility almost immune from taxation while the peasantry and middle class bore the ever-increasing burden. Local government was almost non-existent. All administration was royal and in the hands of appointed, often hereditary officers. And the administration was not only costly but oppressive. Personal rights and liberties as against the government or its officials were non-existent. And yet, such is the force of habitual obedience, the prestige of ancient

²¹ See E. P. Herring, *Public Administration and the Public Interest* (New York and London, 1936); H. D. Lasswell, *Politics: Who Gets What, When, How* (New York and London, 1936).

institutions, that this almost incredible situation lasted until after the American Revolution.²²

Many educated Frenchmen were dissatisfied with this state of affairs, and for a century or more before the revolution there appeared many writings attacking the existing system and suggesting reforms. The authors of these works, generally called the *philosophes*, included Montesquieu, Voltaire, Diderot, Rousseau, and others. At first the criticism took the form of satire and attacked the evils and stupidities of the system rather than the system itself. Later political theorists looked admiringly upon England and borrowed heavily from Locke's brilliant defense of the Revolution of 1688. Rousseau, perhaps the most influential of the pre-revolutionary writers, expounded a more purely democratic form of Locke's theory. Montesquieu's *L'esprit des lois* was a panegyric of the English parliamentary system.²³

The ideological background of the French Revolution was well established when the King, threatened with a financial crisis, called together the Estates General in 1789 for the first time in 175 years. It was soon clear that the *bourgeois* members of the Third Estate were in a revolutionary frame of mind. When an attempt to disband them by force had failed and they had been joined by certain sympathetic spirits from the other two Estates, the King was compelled to permit a joint meeting of the three Estates in which the Third Estate could outvote the other two. This new National Assembly, heartened by the action of the Paris mob which stormed the ancient political prison of the Bastille on July 14, and by other signs of insurrection, first passed the Declaration of the Rights of Man and Citizen,²⁴ and then adopted a Constitution providing

²² For this period see H. A. Taine, *Les origines de la France contemporaine* (Paris, 1876-1893), 6 Vols.; Vol. I, translated by John Durand as *The Ancient Regime* (New York, 1876-1894); A. de Toqueville, *L'Ancien regime et la Revolution* (Paris, 1856), 4 Vols.; A. Petitot and L. J. N. Monmerque, *Collection de memoirs relatifs à l'histoire de France* (Paris, 1819-1829), 130 Vols.

²³ For accounts of the pre-revolutionary French writers see Dunning, *op. cit.*, Ch. XII, *A History of Political Theories from Rousseau to Spencer* (New York, 1920), Ch. I; Cook, *op. cit.*, Chs. XXI-XXIII.

²⁴ This was the first direct statement of the revolutionary theories, adopted

for a liberal constitutional monarchy.²⁵ So far the revolution was a middle-class affair. Its inspiration was the *philosophes* and its model, England. But revolutions seldom run exactly according to plan. The fierier spirits gained control, the old regime had to perish completely, and its symbol, the King, was executed in January, 1793.

A Republic was proclaimed and the Constitution of the Year I (1793) was adopted with enthusiasm. This was genuinely democratic. It provided for manhood suffrage, direct elections, and primary assemblies of citizens to approve proposed laws. The influence of Rousseau, who had faith only in direct democracy, is observable here. The executive was to be a committee of twenty-four members. Although approved by the first plebiscite ever taken in Europe, this Constitution never went into effect. The Reign of Terror ended by engulfing its sponsors, the radical authors of the Constitution, and a reaction set in. The result was the adoption of the Constitution of the Year III, also by plebiscite. It set up a Directory of five members and a legislature able to override the executive veto. The Directory was a failure, unable to establish the revolution at home and at the same time to support the strain of foreign wars. It needed only Napoleon's "whiff of grape shot" in 1799 to blow it to pieces and enable him to take charge of a France that was longing for a strong and stable government. In fact, France had not been ready for the democracy proposed by the bourgeois and intellectuals in 1789. There was no tradition of, or training in, national or local self-government as there had been in England. The Terror produced a natural

by the National Assembly, August 26, 1789. Locke and Rousseau were its chief inspirations. It included the following principles:

Men are born free and equal in rights. (Locke and Rousseau.)

The aim of political association is the preservation of natural rights. (Locke.)

Sovereignty resides in the nation. (Rousseau.)

Law is the expression of the public will and all have a right to participate, directly, or through representatives, in making it. (Rousseau.)

²⁵ This constitution provided for limited monarchy, the impeachment of ministers, a unicameral parliament, indirectly elected for a two-year term by males 25 years of age who paid direct taxes equal to the value of three days' labor. It was already, when put into effect, too conservative for the revolution and its new leaders, Danton and Robespierre.

reaction which had already become evident during the Directory.

In 1799, just ten years after the Revolution, France accepted another Constitution, still more conservative than the last. Inspired by Napoleon, it was designed to make an executive dictatorship possible behind a constitutional and democratic front. The revolutionary tradition in favor of a plural executive was respected. The Constitution provided for three Consuls elected by the Senate for three years. Of these only the First Consul was important and Napoleon himself took this office. There was also provided an extraordinarily complex legislature, quadricameral in form. A Council of State prepared bills, a Tribune considered them, after which a Législature voted on them. If passed, a Senate considered their constitutionality. The Constitution was vague or silent on a number of important matters, which left the strong executive to fill the gaps. In 1802 Napoleon was made First Consul for life and in 1804 a plebiscite approved his assumption of the Imperial crown. Securely established, Napoleon threw his enormous energy and executive skill into the job of housecleaning the administrative and judicial systems. The old provincial lines were ignored in the creation of new administrative units, *départements*, which were controlled by a hierarchy of officials headed by the Emperor. The old provincial *coutumes* or local codes were supplanted by a national *Code Napoléon* prepared under the Emperor's direction, and the judiciary was completely reorganized. Less spectacular than his conquests, these reforms remain the most substantial contribution to modern France made by Napoleon. They have survived with only minor changes to our own day.

Napoleon's fall left a bewildered France at the mercy of the allies, who were determined to crush the revolutionary tradition. In 1814, a Bourbon was again placed on the French throne. But the day of Louis XIV was admittedly past. The new King reigned under a "Constitutional Charter" providing for the creation of a legislature elected on a conservative suffrage (male property-holders, 30 years of age and older). The King had very wide powers: to make treaties and declare

war, to legislate by ordinance, and to initiate all the bills to be considered by the legislature. His ministers, however, were drawn from that body. Charles fully exemplified the statement that "the Bourbons forget nothing, and learn nothing." When he tried to keep a ministry in office that had lost the confidence of both legislature and electorate he was forced from the throne.

He was succeeded by Louis-Philippe, nicknamed "Égalité" and "the bourgeois King." The anti-revolutionary tide had turned, and the revolution was saved, although this fact was hardly obvious for some time. Louis-Philippe came of a cadet branch of the Bourbon house, but posed as the modern democratic King. His Constitution was less autocratic than that of 1814. It has been suggested that its failure to work well was due to the fact that France had as yet no clearly defined political parties and that government was carried on by a series of intrigues and counter-intrigues. In 1848 the government collapsed readily before the efforts of a few republicans and socialists.

A popularly elected National Assembly adopted the next Constitution. It declared sovereignty to reside in the people and separation of the powers of government to be the first requisite of a liberal regime. The legislature was unicameral and elected by a wide electorate. The President was chosen directly by this electorate for a term of four years. American influence is obvious throughout this Constitution.²⁶ At the time, American institutions and political theory enjoyed an enormous vogue among enlightened European democrats. Unfortunately, this attempt was again too doctrinaire and did not represent the real aspirations of the French people. This was shown by the ease with which Louis Napoleon captured the Presidency on the strength of his name, and by the fact that about two-thirds of the membership of the new legislature were royalist in their sympathies. At the end of his term of office, Louis Napoleon had the Constitution revised to give him another ten years and in 1852 declared the Empire re-

²⁶ See E. N. Curtis, *The French Assembly of 1848 and American Constitutional Doctrine* (New York, 1918).

established. This action was approved at a referendum by a vote of forty to one. However well "managed" this plebiscite, it probably did represent the wishes of a majority of Frenchmen.

At the start the Second Empire was as illiberal in its Constitution as the Bourbon Restoration had been; more so in fact, as the ministers were responsible only to the Emperor. The legislature, although impotent, was carefully "packed" so as to give an appearance of popularity to the regime. As time went on Napoleon found it expedient to introduce certain liberal reforms, increasing the powers of the legislature and the like. The question as to whether he would have proceeded with these reforms was settled abruptly by the Franco-Prussian War of 1870.

Two days after the disastrous battle of Sedan, at which the Emperor and most of his army were taken prisoner, a little group of Paris republicans headed by Trochu, Gambetta, and Favre declared the establishment of a Republic and organized a "Provisional Government of National Defense." Paris was besieged and fell to the victorious Prussians despite the heroic efforts of the garrison and the republican leaders. A National Assembly was elected at once and met at Bordeaux. Gambetta and the other republicans desired to hold out for a continuation of hostilities although the mass of the people was interested only in peace. As a result the membership of the National Assembly was overwhelmingly royalist in sentiment. Fortunately for the Republic, the royalists were sharply divided into: Legitimists, who wanted the grandson of Charles X; the Orleanists, who favored the Count of Paris, grandson of Louis-Philippe; and the Bonapartists. Unable to agree upon any other solution they agreed to continue the Republic temporarily and chose Adolphe Thiers as "Chief of the Executive Power of the French Republic." They did this the more readily as they did not want the new monarch to be associated with the unpleasant duty of raising the indemnities to be paid to Prussia. It seemed at one time that the royalists would be able to compose their differences, but they were frustrated by the truly Bourbon obstinacy of the Comte de Chambord, the Legitimist

candidate. As time passed and vacancies in the Assembly were filled by new men, the republicans were gaining strength.²⁷

In May, 1873, a republican Constitution was suggested to the Assembly with Thiers' approval. The monarchists joined forces to vote want of confidence and he and his ministers resigned. The new President, MacMahon, was intended to be a stop-gap for the monarchy and a law was passed giving him a seven-year term, ample time for a royalist *coup d'état* if necessary. But in the meantime a more orderly scheme of government was felt to be necessary. A committee was appointed to draft a Constitution and in 1875 their suggestions were brought up for debate in the Assembly.

Soon the three "constitutional laws" of the Third Republic were adopted and were supplemented by several "organic laws."²⁸ This has been called the "Cinderella" of French Constitutions. It was drafted and adopted by men who, in the main, neither respected it nor thought that it would persist as a scheme of government. Its very imperfections were perhaps its salvation, for it consisted of the provisions for the bare necessities of government. It contained no statements of political philosophy, no Bill of Rights, no mention of the judiciary, no definite electoral system. These and other matters were left to ordinary "organic" law and could be changed as needed by simple legislative action.²⁹ The Constitution was thus "written" but was highly flexible and could be altered in accord with public demand before that demand had been frustrated and the revolutionary spirit aroused again. Even the "written" portion contained in the three "constitutional" laws could be

²⁷ In July, 1871, the Republicans gained 100 new seats, or 300 out of 738.

²⁸ The various French constitutions may be found translated in F. M. Anderson, *Constitutions and Other Select Documents Illustrative of the History of France 1789-1907* (Minneapolis, 1908). For a brief account of the history of France from Napoleon I to the establishment of the Third Republic, see J. E. C. Bodley, "France," *Encyclopaedia Britannica* (11th ed.), Vol. X, pp. 859-876.

²⁹ It is a principle of French public law that the disappearance of a government does not invalidate its legislation, which must be expressly repealed. Some authorities, including Duguit, apply this to constitutional laws and maintain that revenue and supply must be voted annually after laws of 1848 and 1791 and that civil rights are protected by the Declaration of Rights of Man and Citizen (1791). The Declaration at all events has the symbolical value of the Englishman's Magna Carta.

amended by a meeting of the National Assembly, a joint meeting of the two chambers of the legislature. In fact the National Assembly has met only three times to amend the Constitution.

The first of the three fundamental laws was passed on February 24, 1875. It described the appointment and term of senators, and provided that the Senate have coordinate powers with the Chamber of Deputies except for money bills, and that it act as a court for impeachments. The next day another constitutional law was adopted. It was concerned with the Presidency, the Chamber of Deputies, and the method of amending the Constitution. It also provided for the Cabinet system of parliamentary government, by ministers chosen by the President but responsible to the Chamber. In July, the third constitutional law was passed to fill some of the gaps left by the first two. It described the sessions of Chamber and Senate, their right to determine the eligibility and election of their own members, and the privileges of the members as regards free speech and freedom from arrest. The President was given further powers: to adjourn the Chamber and Senate, to send messages to Parliament, to exercise a suspensory veto over legislation. His power to declare war and ratify certain treaties was made conditional upon the approval of Parliament. Ministers were given permission to attend and address both Houses.

The amending arrangement requires that each Chamber vote by absolute majority in favor of holding a National Assembly. This body, the joint membership of both houses, meets at Versailles where there is a sufficiently large hall removed from the possible interference of the Paris mobs. As stated above, this body has met to amend the Constitution only thrice. In 1879, it repealed the section making Versailles the seat of government. In 1884, four amendments were made at a single sitting. It was declared that a new election within two months must follow a dissolution of the Chamber, that the republican form of government is never to be subject to revision, and that members of former reigning families are ineligible for the Presidency, that laws regarding the Senate and its organization should no longer have a constitutional character, and finally,

that public prayers in all churches be no longer required at the opening of a new session of Parliament. The third occasion was in 1926 when the *Caisse d'amortissement* was given financial autonomy and the permanent right to specified revenues.

The most obvious characteristics of this Constitution are its brevity, its incompleteness, and its unsystematic arrangement. It is seen also to be a compromise between a republic and a constitutional monarchy. This was due to the influence of the royalists who hoped to have the President step aside at the right moment in favor of their candidate for the throne. The English influence is obvious too. The President is irresponsible, like a King. He is not elected but chosen by the National Assembly and may be impeached for high treason only. His right to dissolve the Chamber with the Senate's consent is a relic of the royal prerogative. His right to adjourn the legislature and call special sessions also harks back to the days of the three Estates. The bicameral legislature with an appointed Senate is not in the French republican tradition which favored single chambers. The Cabinet system was borrowed from England.

As the Constitution developed certain changes were made in the direction of democratization. The President's right to dissolve the Chamber became a dead letter after its single unfortunate employment by MacMahon. The Senate became an elected body and in general tends to defer to a determined Chamber. The President has generally been content to assume the rôle of a constitutional monarch, and can do little else because all his official acts require a ministerial countersignature. The Constitution of 1875 was sufficiently flexible to assume very different shapes according to the spirit which motivated the government. This spirit was democratic, in the long run, and France became a democracy. The revolution had triumphed at last.³⁰

³⁰ For the best full account of the political history of 1875 and an analysis of the Constitution see G. Hanotaux, *Contemporary France* (New York, 1903-09), Vol. III, Chs. I-V. Good short accounts are found in E. M. Sait, *Government and Politics of France* (Yonkers, New York, 1920), Ch. I; F. A. Ogg, *European Governments and Politics* (New York, 1934), Chs. XXI, XXII; E. P. Chase, R. Valeur, and R. L. Buell, *Democratic Governments in Europe* (New York, 1935), pp. 261-289.

CHAPTER II

HISTORICAL INTRODUCTION: THE TOTALITARIAN STATES

Russia

The Russian Revolution of 1917 which overthrew the absolute monarchy of the Tsars was long overdue. On the eve of the Great War, the Russian government was much like that of seventeenth-century France. Up to 1914 Russia remained a huge congeries of territories governed by a centralized bureaucracy responsible only to the Tsar. It was mainly agricultural on a very low level of efficiency. Although serfdom had been abolished by the "enlightened" Alexander II in 1861, the lot of the peasants had scarcely been improved by the change. The cities were mainly residential and trading centers, although such manufacturing as had been developed prior to the war was chiefly in large factories employing numerous workmen. These workmen, torn from their roots in the land, having made a clean break with the past, and suffering under adverse conditions and an oppressive government, were ready to embrace revolutionary ideas.¹

The history of Russian constitutionalism is longer than most people suppose, but it is a history of abortive attempts and frustrations. From each encounter with popular government, the monarchy emerged victorious. As early as the sixteenth century an elected National Assembly had been summoned from time to time at the command of the Tsar. There was, however, no powerful feudal baronage and no middle class nor any consciousness of national unity, and the Assemblies were discontinued with the establishment of serfdom as the basis of Russian economy and social life. Catherine the Great summoned a representative elected Assembly in 1766 which also might have contained the seeds of constitutional

¹ See Leon Trotsky, *The History of the Russian Revolution* (New York, 1932), Vol. I, pp. 10-11.

development had it not been for foreign wars, the Pugachev rebellion,² and the reaction in Russia to the French Revolution. The Napoleonic invasion in 1812 once more prevented a liberal Tsar, Alexander I, from carrying out his original plan for a Constitution, and it was not until 1905 that Tsar Nicholas II reluctantly created the Duma. This he did because of widespread unrest and a distinctly revolutionary feeling among the middle class and intellectuals as well as the urban workers and peasantry following the disasters of the Russo-Japanese War.

The original Duma was elected on a wide suffrage, with direct election in the cities and indirect in rural areas and towns. It was given legislative powers of importance and was in fact able to accomplish a number of considerable reforms. As a result of early conflicts with the Tsar, the electoral law was changed so that all Dumas after the first one were not representative at all. According to Trotsky, the middle classes were frightened of the revolutionary fervor they had helped to arouse so that from this time on, middle class and proletarian efforts were sharply distinct.³

The World War was disastrous for Russia almost from the very start. By 1915, the armies were actually beaten. The generals were nearly all incompetent. Their only cure for failure was further mobilization of huge armies for which they had neither equipment nor practical use and which only added to the general confusion. Graft and corruption characterized the whole military administration.⁴ The efforts of the Duma to improve the situation were ineffective. The official opposition, the "Kadets" (Constitutional Democrats), declared their patriotism and their unconditional cooperation with the government for the successful prosecution of the war. They joined the "Progressive Bloc" with the Progressives, Octobrists, and others including the various "nationality" groups, Poles, Jews, etc. These various parties desired to win the war, establish a stronger and more efficient government to that end, and prevent

² *Ibid.*, p. 8.

³ *Ibid.*, p. 13.

⁴ See Negley Farson, *The Way of a Transgressor* (New York, 1936), Ch. XIX, also Trotsky, *op. cit.*, Ch. II.

revolution.⁵ Their efforts were entirely unavailing owing to the Tsar's complete incapacity and his subservience to his wife, a fanatical believer in divine right and absolutism, and to the notorious Grigori Rasputin.⁶ The Tsar's reply to the Duma's demand was a dissolution in September, 1915. It was again convoked in May, 1916, but its members appeared to feel that their opposition to the Tsar's government was hopeless. By fall of that year the war situation seemed desperate to everybody. The Progressive Bloc in the Duma thundered against the government and that body was again dissolved. The Tsar, or rather his advisers, had decided to repeat the suppression which had been successful in 1905. By this time even the nobility and the bureaucrats, every one outside the Court cabal, demanded a strong responsible government. The last session of the Duma was convoked on February 14, 1917, but its leaders were again weary of their impotence in the face of the government's obstinate stupidity, and with revolution only two weeks away, the session was described as "languid."⁷

The Duma was again dissolved on February 23 (old style).⁸ Simultaneously strikes broke out all over Petrograd. Accounts differ as to the origin of these strikes and as to the subsequent action of the Duma in creating a Provisional Government. The strikes appear to have been spontaneous in origin but to have been organized and directed by revolutionary leaders among the workers as soon as they began. Many of these leaders were Bolsheviks, that is, revolutionary Marxists who wished the immediate establishment of a labor-socialist state by an alliance among industrial workers, soldiers, and poor peasants. Trotsky's version of the February "Five Days," February 23-27 (old style) 1917, is that the Duma was forced unwillingly to be a partner in the revolution.⁹ Once the Tsarist government had fallen, the Duma was the obvious legatee of power if chaos

⁵ Trotsky, *op. cit.*, p. 25. Also pp. 499-502 for a list of political parties and groups.

⁶ See R. H. B. Lockhart, *British Agent* (New York and London, 1933), Bk. III, Chs. III, IV.

⁷ Trotsky, *op. cit.*, p. 32.

⁸ The dates given follow the Byzantine calendar in use in Russia at the time. February 23, "old style" is March 10, in the western calendar.

⁹ See Trotsky, *op. cit.*, Chs. VII-IX.

were to be averted. At the same time a self-appointed "Executive Committee of the Soviet of Workers' Deputies" was formed by moderate Socialists. This Committee asked the Duma to assume power and also called for elections to the Soviet which as yet had no existence.¹⁰ The elections were held at once and the result was an overwhelming majority for the Mensheviks and Social Revolutionaries.¹¹ The Bolsheviks were greatly outnumbered. The Executive Committee was really in control of the situation because it had the support of the mutinous troops who had fraternized with the striking workers when called out to subdue them. It demanded the Tsar's abdication and promised to support the Duma if the abdication could be forced. The Tsar duly abdicated on March 2 (old style) in favor of his brother the Grand Duke Michael Alexandrovich, and the latter accepted conditionally, vesting authority in the Provisional Government. Kerensky, Vice President of the Executive Committee, became Minister of Justice in the Provisional Government and its actual chief.

There were several reasons for the failure of the Provisional Government. It had disbanded the police and had no force behind its decrees. It was constantly subject to the criticism of the Petrograd Soviet which was really "a sort of permanent mass meeting" of soldiers and workers' deputies. Kerensky tried to assume a middle-of-the-road position which lost him the confidence of the middle classes and at the same time took no measures to stifle "left" opposition. Perhaps his greatest mistake was his failure to come out for immediate peace with Germany, for that was the one thing desired above all else by nearly every one in Russia.¹² Instead, he vainly urged a renewed military offensive against Germany.

Lenin arrived in Russia in April, 1917, and at once urged that peace be concluded by the soldiers themselves, with or without official sanction. He also desired an immediate con-

¹⁰ The word "soviet" simply means "council."

¹¹ The Mensheviks (literally, "majority group") were moderate Marxian socialists looking toward a union with the liberal bourgeoisie and a democratic republic. The Social Revolutionaries were a peasant socialist party containing many disparate elements from anarchist revolutionaries to mild socialists.

¹² See Lockhart, *op. cit.*, pp. 174-177.

stitutional convention and the assumption of all authority by the Soviets at the expense of the Provisional Government. Lenin won the other Bolshevik leaders over to his position and it had great popularity with the masses. Nevertheless, the first Congress of the Soviets which met in Petrograd in June contained only 105 avowed Bolsheviks to 285 Social Revolutionaries and 248 Mensheviks.¹³ Although they seemed to be a minor faction at this time, the Bolsheviks were actually gaining ground steadily within the Soviets. An attempt was made to set up a Bolshevik dictatorship in July. This failed but in November it succeeded and the Council of People's Commissars replaced the Provisional Government whose leaders were arrested or fled abroad. This Council was made up of Bolshevik leaders only, including of course, Lenin and Trotsky, chosen by the Central Committee of the Bolshevik Party. The Bolsheviks were still cooperating with the left-wing Social Revolutionaries but next year, after an attempted *coup d'état* of the latter party (which included the assassination of the German ambassador), they too were outlawed.¹⁴

The Congress of Soviets which convened at Petrograd on November 7, 1917 declared that supreme power belonged to the Council of People's Commissars and also to the Congress of the Soviets and its Executive Committee. The Council of People's Commissars was declared to be "responsible before the Congress" but this responsibility was undefined and in any case meaningless so long as Lenin was President of the Council and retained dictatorial powers within his party. The Congress also adopted a "Declaration of the Rights of the Exploited and Laboring Masses," reminiscent of the "Declaration of the Rights of Man and of Citizen," while significant of the differences between the French and the Russian Revolutions.

In January, 1918 the long-hoped-for constituent assembly

¹³ See Trotsky, *op. cit.*, p. 438.

¹⁴ See Lockhart, *op. cit.*, pp. 292-300 for an interesting account of the temporary Bolshevik-Social Revolutionary alliance and the fifth All-Russian Congress held in Moscow, July, 1918. The chief difference between the parties was over the Brest-Litovsk peace, negotiated by the Bolsheviks and hateful to the Social Revolutionaries because it gave the Ukraine to the Germans and it was in this province among the kulaks that the Social Revolutionaries had their greatest strength.

met to draw up a permanent Constitution. Again the Bolsheviks were greatly outnumbered. Together with their left Social Revolutionary allies they were only 235 to an opposition of 492, most of whom were peasant right-wing Social Revolutionaries. This assembly refused to recognize the authority of the Soviets and was disbanded and dispersed by the Bolsheviks. The work of drafting a Constitution was then entrusted by the Commissars to a commission containing a Bolshevik majority. Their labors were completed by July and after Lenin had approved it the Constitution was accepted by the fifth Congress on July 10.

This Constitution was intended to carry out, as far as possible, the program of the Communist Party. To attain this end it crystallized the existing soviet system and gave an appearance of democracy (aside from the exclusion of non-proletarians) while preserving actual power in the hands of the executive Presidia which in turn were dominated by the Communist Party leaders. This was done by giving all the powers of the large, even unwieldy, elected bodies to their Presidia as well. The latter, Communist or Communist-dominated, were permanent and were able to control the legislative bodies at their brief and relatively rare sessions. In this connection it may be noted that the sixth Congress of the U.S.S.R. met in 1931 and the seventh not until 1935. This, despite the crucial changes made during the four-year period. Executive domination is further emphasized by the way in which the Constitution has been altered. Although legally this might be done only by the Union Congress, in fact the Executive Committee tended to make the change first and then have it ratified automatically by the next Congress.

There is no space here to recount all the changes that have taken place since 1918 in Russia. The government established in that year was faced at once with a civil war and the intervention of allied troops. The "Red Terror" was an inevitable consequence, as were the courts of "revolutionary justice" which superseded the regular tribunals and substituted party expediency for any and all rules of law. Victorious, the Bolshevik leaders began the gigantic task of reorganizing a demoralized

and mostly illiterate population, by now largely deprived of their former ruling classes. There were also the natural obstacles of vast distances and insufficient railroads and highways. Another difficulty was the great number of nationalities and languages comprised in "all the Russias." This last difficulty was met in a statesmanlike manner by the Constitution of 1922, which set up the Union of Soviet Socialist Republics, giving the various nationalities the status of Constituent Republics, Autonomous Republics, or Autonomous Regions. These peoples were given the form of near-independence but the Soviet system was preserved throughout, as was Bolshevik domination.

During the period of Lenin's New Economic Policy (1921-1928) there was a considerable recession from Communist severity and private trading was permitted in order to restore a moribund economy. This was taken as evidence of the coming end of Communism by many observers.¹⁵ The peasants who were in a good position to bargain because of the great scarcity of food, chose this time to demand voting equality with the city workers, an open market, and no tax on savings. The time had evidently come to "liquidate" the "Nepmen" (those who engaged in profitable enterprise under the N.E.P.) as well as collectivize agriculture if the socialist state were to endure. Accordingly, in 1928, Stalin introduced his Five-Year Plan for increased industrial production in the heavy industries, but especially for the socialization of agriculture. This was accomplished, but not without severe measures including the actual starving to death of hundreds of thousands of peasants who refused to cooperate.¹⁶

Gradually farm collectivization and the employment of tractors and other modern farm equipment has enlarged production and rendered the food shortage less acute. Factories have been built and water-power projects completed. An attempt has been made to meet the housing problem. Real wages remain extremely low for the masses according to western standards

¹⁵ See Walter Duranty, *I Write As I Please* (New York, 1935), pp. 182-183 and *passim*.

¹⁶ W. H. Chamberlin's estimate is five or six million deaths from starvation in the famine of 1922-1923. See his *Russia's Iron Age* (Boston, 1934).

but they have been raised.¹⁷ Recently a tendency has been noted to encourage a closer conformity with western "bourgeois" standards of comfort, cleanliness, and dress.¹⁸ This tendency has coincided with a movement toward liberalism, or, as its radical enemies put it, toward a restoration of the bourgeois state. An example of this to be found in the social sphere is the recent tightening of marriage and divorce laws, the encouragement of faithful monogamy, the sharp reduction of provision for free abortions, and even the reduction of birth control clinics. Politically this movement has culminated in the new Constitution called by Stalin "the only democratic one in the world."¹⁹ This was drafted by a special commission with Stalin as chairman, appointed by the seventh Congress of Soviets in February, 1935. It was approved by the Central Executive Committee of the U.S.S.R. and its Presidium and published on June 12, 1936.²⁰ The public was invited to offer suggestions for amendment, some of which, of minor importance, were incorporated in the final draft which was enthusiastically ratified by the All-Union Congress of Soviets (the eighth) on December 5, 1936.²¹

Like its predecessor, this Constitution gives the U.S.S.R. a very elaborate federal system, the only kind satisfactory in view

¹⁷ See the following dispatches in the *New York Times*: Harold Denny, "Russians Enjoying Western Luxuries," March 1, 1936 and "Peasant Earnings Increase in Soviet," March 16, 1936; Walter Duranty, "Real Wage Level Varies in Russia," July 11, 1936.

¹⁸ See Eugene Lyons, "Russia Postpones Utopia," *Scribner's* (October, 1935), Vol. XCVIII, pp. 235-237; Harold Denny, "Moscow Dances by Soviet Order," *New York Times*, May 16, 1936. For descriptions of progress in building, education, "Stakhanoffism," etc., see the following articles in the *New York Times Magazine*: Walter Duranty, "A New Moscow Grows Out of the Old," May 17, 1936 and "New Russia Graduates Her First Generation," June 28, 1936; Harold Denny, "Russia Weighs a Year of Stakhanoffism," September 20, 1936.

¹⁹ See Harold Denny, "Stalin Relaxes His Iron Hand Slightly," *New York Times Magazine*, December 6, 1936.

²⁰ A translation of this draft was published in the *New York Times*, June 26, 1936.

²¹ Translated, with historical introduction by Sir Bernard Pares, in *International Conciliation* (February, 1937), No. 327, pp. 135-163. See Kathleen Barnes and Harriet Moore, "The Soviet Constitution of 1936," *Research Bulletin on the Soviet Union* (September 30, 1936), Vol. I, No. 9. This contains a favorable and very uncritical commentary. See also V. M. Dean, "The New Soviet Constitution," *Foreign Policy Bulletin* (June 26, 1936), Vol. XV, No. 35.

of the large number of nationalities of various culture-levels within the Union. "The highest organ of State power" is declared to be the "Supreme Council (Soviet) of the U.S.S.R." This is a bicameral legislature, consisting of the Soviet of the Union and the Soviet of Nationalities.²² The two Chambers are equal in legislative authority. The former is elected by universal, direct, equal suffrage, and secret ballot. The suffrage is denied to none because of race, creed, social origin, or even past activity—an important change alleged to indicate that classes have been eliminated in the Union. Citizens become voters at the age of eighteen for both sexes and any voter may be nominated for office. It is noteworthy, however, that only the Communist Party is mentioned and, by inference, no other is permitted. Other associations, "professional unions, co-operatives, organizations of youth, cultural societies," may make nominations but evidently no strictly political party other than the Communist Party is recognized.²³ The system is kept whereby almost all powers of the legislature are exercised by its Presidium between sessions, subject to later confirmation by the legislature.²⁴ The administration is, as before, collegiate, and consists of the Council of People's Commissars. This body is declared to be responsible to the legislature and its Presidium, and is appointed by the legislature. If interpellated by a deputy the Council or the individual Commissar concerned must reply within three days.²⁵ This all has the appearance of parliamentary government of the usual sort with a responsible ministry, very much like the Swiss system. Until actual practice has been established, however, it is unsafe to assume that the domination of government by the leaders of the Communist Party will be affected in any important respect by the new Constitution.

A very interesting innovation is the list of "Fundamental Rights and Obligations of Citizens."²⁶ This recognizes the

²² *International Conciliation* (February, 1937), No. 327, Constitution, Ch. III, Arts. 30-39.

²³ *Ibid.*, Ch. XI, Arts. 134-142.

²⁴ *Ibid.*, Ch. III, Arts. 46 and 48.

²⁵ *Ibid.*, Ch. IV, Art. 63; Ch. V, Arts. 64-78.

²⁶ *Ibid.*, Ch. X, Arts. 118-133.

right to work, to rest, to material security in old age or illness, to education, equal rights for women, religious freedom (including "freedom of anti-religious propaganda"), and the traditional democratic bill of rights: freedom of speech, press, assembly, and demonstration in the streets. Still more significant is the guarantee against arbitrary arrest and search.²⁷ There is, however, no "habeas corpus" provision, so that it would be legally possible on the warrant of the state attorney to hold a citizen indefinitely without trial. A strikingly un-Marxian and bourgeois idea is reflected in the sentence, "The defense of the fatherland is the sacred duty of every citizen of the U.S.S.R." ²⁸

Italy

From the break-up of the western Roman Empire down to the nineteenth century, Italy was merely a "geographic expression." It was also the battleground of Europe and the scene of a deadly rivalry between Pope and Emperor for the domination of the West which led eventually to the defeat of both contestants. In the late Medieval and Renaissance periods many great city-states such as Venice, Florence, and Genoa, rose to great heights of power and wealth, but none ever succeeded in dominating the peninsula and restoring Italian unity. Not that this ideal was unimagined. Many great Italians in all periods lamented the existence of bitter inter-city rivalries and the local jealousies that made unification impossible beyond the narrow limits of temporary alliances. Early in the fourteenth century Dante wrote *De Monarchia*, a plea for secular unity under the Emperor.²⁹ Italian unity was the cherished dream of Machiavelli, who wrote his famous handbook for politicians, *The Prince*, in the hope, it is said, that it would

²⁷ *Ibid.*, Ch. X, Arts. 127, 128.

²⁸ *Ibid.*, Ch. X, Art. 133. The most complete work in English on the soviet system is Sidney and Beatrice Webb, *Soviet Communism: A New Civilisation?* (New York, 1936), 2 Vols. See also Ogg, *European Governments and Politics*, Chs. XXXVIII, XXXIX, and Hill and Stoke, *op. cit.*, Pt. V, Chs. XXIII-XXV.

²⁹ See W. A. Dunning, *A History of Political Theories, Ancient and Medieval* (New York, 1902), pp. 230-235. Also Geza Engelmann, *Political Philosophy from Plato to Jeremy Bentham* (New York and London, 1927), Ch. IV.

inspire an ambitious tyrant to spread his dominion over the whole country.³⁰ It is interesting to note that Mussolini has always been interested in Machiavelli, not so much as a precursor of Italian unity, but as a realistic observer of men and an excellent teacher of the methods of government.³¹

Modern Italian history really begins with the conquest of Italy by Napoleon. When the Napoleonic Empire collapsed Italy was divided between Austrian Hapsburgs and the Spanish branch of the Bourbons. Liberal tendencies were ruthlessly crushed but liberalism, strengthened by Italian national patriotism, grew beneath the surface. In 1848, the year of revolutions, constitutions were wrested from unwilling princes in several Italian states. The most liberal of these was the *Statuto* of Piedmont where ruled the House of Savoy, of native blood. The Kings of this house, notably Victor Emmanuel II, remained faithful to the principle of constitutional monarchy and parliamentary representative government from that date forward. Because of this, and because of the Italian origin of the dynasty, Piedmont became the center of an Italian national and liberal movement. Aided by the genius of a Piedmontese Prime Minister, Count Cavour, the Kings of Piedmont were able to enlarge their dominions. In the South, Garibaldi raised the banner of liberty in Sicily and Naples and brought them into the Kingdom of Italy which had been forming around the nucleus of Piedmont. The last independent state to capitulate was Rome, still a temporal autocracy under the Pope. This occurred in 1869, and in 1872 King Victor Emmanuel made a triumphant entry into the Eternal City as King of a United Italy.

The government of Italy continued to be based upon the *Statuto* of 1848. It was a constitutional monarchy of the English type. Executive power was in the hands of a ministry responsible to an elected Parliament, and chosen by the King. The Italian King retained more actual power than his English cousin. This was partly due to the fact that there

³⁰ Dunning, *A History of Political Theories, Ancient and Medieval*, Ch. XI; Engelmann, *op. cit.*, Ch. V.

³¹ See H. A. Finer, *Mussolini's Italy* (New York, 1935), pp. 34-35. This book is the best account in English of the Fascist state.

were no national political parties in Italy strong enough to control Parliament except by alliance with others. As a consequence, the King had often a choice of Prime Ministers; any one of two or three might be able to form a government. Further, democracy in Italy remained somewhat academic. There was really little demand for it among the Italian masses who were not upset by the news that the King had dismissed a ministry which had not yet fallen in Parliament, or that he had refused his assent to a bill. The conditions of survival in Italian politics led to the development of skill at intrigue rather than statesmanship, and the most successful Premiers were those who were adept at sowing dissension among their enemies and at changing their colleagues with bewildering frequency. Ministries were the result of unstable coalitions subject to sudden interpellations in the Chamber of Deputies.

The suffrage of 1871 was a very narrow one but was broadened from time to time, until in 1919 manhood suffrage was granted. The electorate was never very politically active, however, and those who voted were in many cases merely doing the bidding of the local political machine.³²

The Chamber of Deputies consisted of over 500 members chosen by direct secret vote. The single-member district system was used in general, until the introduction of a list system of proportional representation in 1919. How this would have affected Italian political life will never be known for it was used only once before the Fascist *coup d'état*. The Senate, a body of distinguished men chosen for life by the Crown from certain categories, rapidly assumed a secondary position politically, corresponding roughly to the English House of Lords or the Senate of Canada. Local government was highly centralized after the French model.³³

³² See Finer, *op. cit.*, p. 65. For a scathing description of Italian pre-Fascist politics as well as a bitter denunciation of the Fascist regime see the novel by I. Silone, *Fontamara*, English translations by M. Wharf (New York, 1934) and by G. David and E. Moshacher (London, 1934). The author is a Marxist Italian in exile.

³³ For descriptions of the pre-Fascist Italian government and the origins of modern Italy, see Ogg, *European Governments and Politics*, Ch. XXXVI, and W. B. Munro, *The Governments of Europe* (New York, 1925), Chs. XXXIII, XXXIV.

This parody of representative government, for it was little more, proved to be unable to withstand the tensions, political and economic, in post-war Italy. Italians in general were either not interested in the government or were disgusted with it. The only strong party was the Socialist and it was sharply divided into moderate and radical groups. In addition to the Socialists there were Nationalists who were inspired by the rather hazy idealism of Gentile and were thoroughly disgusted with the sad results of the heroic *risorgimento*. The outbreak of war found politically active Italians differing on the question of entry and as to which side to join. The Socialist editor of *Avanti*, the party newspaper, was Benito Mussolini. At first he took the official Socialist anti-war position but later resigned the editorship to found a pro-war, pro-French paper, *Popolo d'Italia*. This was in November, 1914. By the spring of 1915 his action and that of others had led to a formidable pro-war agitation, and Italy entered the war with the allies in May, 1915. From the war Mussolini emerged inspired with the virtues of military obedience and morale. At this time he apparently began to see himself as a Man of Destiny, and to realize that he would have to found his own party. It was easy for him to attack the existing government. That minority of Italians who took an interest in politics were in general disgusted with Italy's share in the spoils of war. The government, too, failed to provide any solution for the returned soldier problem and these former heroes found themselves jobless and actually unpopular with the masses who now hated the war. Unemployment was very serious in extent and there was a post-war depression which was not relieved by an inflationary movement. The lira dropped and prices rose. Strikes became general.

In March, 1919 there was a large Communist demonstration in Milan. A few days later Mussolini founded his *Fasci di Combattimento* in that same city. This "fighting band" was one of a series of similar but unamalgamated groups which had begun to be formed all over Italy. Appealing chiefly to veterans, their attitude was highly nationalistic and radical. They wanted the Dalmatian coast for Italy and, at home, the

expropriation of the great estates and syndicalism in industry. They denounced the Communists but found the Socialists too moderate.

There is some evidence that Mussolini at this time hoped to win the Socialist Party to his side and to become its leader.³⁴ If so, his hopes were in vain for the Socialists remained faithful to their existing leadership and hoped in time to get a parliamentary majority. As it was they were strong enough to overturn one government after another and to extract some mild reforms.

For the first time since before the war, elections were held in November, 1919. The new system of proportional representation gave the Socialists 156 seats and the *Popolari* ³⁵ 101, together, about half the Chamber. The Fascists failed to get a single seat, Mussolini himself being badly beaten. The new government, however, was no stronger than its predecessors and failed dismally to preserve order and prevent or settle the increasing number of strikes. For one thing the Premier, Nitti, was afraid to annoy the large Socialist group in Parliament whose members favored the strikers. Mussolini on the other hand took advantage of the situation to have his Fascisti help the police and army in their fights with disorderly workers. This facilitated the conversion of the police to Fascism or at least rendered them sympathetic to the Fascists.

A new series of strikes broke out in August and September, 1920, starting with a lock-out at the Remeo plant in Milan. This led to a seizure of the factories by the workers all over north Italy, and the hoisting of the red flag. This was no real revolution, however. The Premier, Giolitti, refused to send troops against the workers as some of the industrialists urged him to do. He felt that the strikers would soon come to terms because of their own unpreparedness for revolution and the fact that they lacked managerial talent for running the plants. He was right. The strikes collapsed but the middle classes and the wealthy had been badly frightened. Giolitti with his skill

³⁴ See Gilbert Seldes, *Sawdust Caesar* (New York, 1935), Ch. VIII.

³⁵ A new Catholic reformist party led by a priest, Don Sturzo. See Ogg, *European Governments and Politics*, pp. 282-283.

at intrigue and compromise, his lack of enthusiasm, had ceased to command respect even though he had handled the strike situation adroitly. The bourgeoisie was looking for a leader, a St. George to wage relentless warfare with the (probably harmless) dragon of Italian Communism. They found this leader in Mussolini. The Fascist Party grew rapidly now. From a membership of 30,000 in the spring of 1920 it had grown to 100,000 by February, 1921, and by October, 1922, when occurred the March on Rome, this number had been tripled.

This phenomenal success was due to the Fascist assumption of leadership in the war against Communism and their proof of this in the ruthless violence they employed against industrial and peasant workers.³⁶ During 1921, Fascist *squadristi* virtually took over the government of large areas, commanding the Prefects and replacing the communal governments with their own followers. The army, circularized by Mussolini's *Popolo d'Italia* at government expense (for its "patriotic sentiments") was in sympathy. Indeed an official army circular of October 20, 1920, had commanded military-Fascist cooperation.³⁷ Giolitti, the Prime Minister, saw the Fascists dispersing the Socialists and was pleased that they should do this while the government stood by. He hoped that he would escape the odium of Fascist action and yet secure the destruction of the Socialist opposition. The opposition offered the *squadristi* by the members of labor unions and other "proletarian" organizations was very feeble. The workers were unarmed, unorganized and not prepared for battle. The army and police either ignored the Fascist squads or helped them.

When Giolitti called for elections in May, 1921, he hoped for a reduced and cowed opposition. The outcome was a thoroughly divided Chamber, but one with the Socialists still commanding the largest block of seats. They had 122 (a loss of 34); but there were 16 Communists and 107 *Popolari*. The

³⁶ During the first six months of 1921, the headquarters of at least 25 "People's Houses," 59 Chambers of Labor, 85 Cooperative Societies, 43 Agricultural Labor Unions, 10 printing works, and 6 newspaper offices were destroyed by Fascist "squads." See Finer, *op. cit.*, p. 132, quoting Chiurco, *Storia della Rivoluzione Fascista*, Vol. I. See also Silone, *op. cit.*, *passim*.

³⁷ Finer, *op. cit.*, p. 132.

right consisted of 10 Nationalists who were pro-Fascist and 35 Fascists. The rest of the membership was scattered among a large number of democratic and liberal groups. Giolitti was voted out of office by this Chamber to be succeeded by Bonomi, a moderate Socialist whose cabinet included Don Sturzo, leader of the *Popolari*. By this time Fascism had become less socialistic and more anti-Communist, violently nationalist and more interested in the discipline of labor than of capital; in other words, a definitely middle-class party. Up to November 7, 1921, it was not indeed a party, technically, but a movement containing members of other parties. On that date it became a party at Mussolini's demand.

When, too late, Bonomi decided to disarm the Fascists he found it impossible to do so. Neither army nor police could be counted on for anti-Fascist activity and the Socialists had no weapon but strikes. Bonomi fell, to be followed by Facta who was equally helpless. Whether Mussolini really intended a dictatorship, even up to the eve of the March on Rome, is doubtful; but he had little choice in the matter, if he were to remain at the head of his party. The famous March on Rome was staged on October 26-28, 1922. The King refused to sign a mobilization order asked for by Facta. The Premier resigned and the King sent a telegram to Mussolini, who had awaited the outcome of the March in Milan, asking him to accept the Premiership.

Mussolini's first task was to destroy the opposition, for the Fascists were still a minority party. Fascist violence continued throughout the country, organized by the *squadristi* who were now an official militia. In order to secure a docile Parliament Mussolini secured emergency powers in November, 1922, as soon as he met the Chamber. The opposition continued, however, and Mussolini secured the passage of the election law of 1923 providing that any party receiving a minimum of 25 per cent of the votes cast, and a plurality, should be given two-thirds of the seats in the Chamber. This, it was claimed, would prevent an interminable succession of weak coalition governments. Under this law elections were held in April, 1924. The full force of the militia was thrown into the struggle. Propa-

ganda, violence, and intimidation secured a majority over all other parties (268 seats to 267) for the Fascists. This gave them two-thirds of the seats in the redistribution and made parliamentary opposition ineffective. There was now no obstacle in the way of as many constitutional changes as the Fascist leaders desired, for a simple vote of both Houses sufficed to change the Italian Constitution and the Senate, if obdurate, could be controlled, as in the past, by new creations.

Following the murder of the Socialist deputy Matteotti,³⁸ the opposition parties withdrew from the Chamber. It was then possible for Mussolini to crush all opposition by a series of decrees and laws controlling the expression of opinion, oral or written, and turning the entire periodical press into a medium for Fascist propaganda. The only place where open opposition could have continued, the Chamber, was closed to the other parties by their own action.

It was next necessary to reorganize the governmental system to put it in line with Fascist ideas, and this was done by a series of laws.³⁹ The Grand Council of the Fascist Party created a Constitutional Commission in August, 1924, and this became an official state commission in January, 1925. The recommendations of this body as regards executive-legislative relations were in the direction of executive dictatorship. A law of December 24, 1925, established a new office, *Capo del Governo*, appointed and dismissable by the King. This strengthened Prime Minister appoints his ministers, subject to royal approval, and directs their activities as a superior. Mussolini has frequently changed the composition of the cabinet.⁴⁰

Parliament was retained but universal suffrage was abolished in May, 1927, and early in 1928 the Chamber was really made appointive by the Grand Council of the Fascist Party. Confederations of Employers and Employees presented 800 names and other associations 200 names. Others were added

³⁸ See Finer, *op. cit.*, p. 234; Seldes, *op. cit.*, Ch. XIV.

³⁹ See Finer, *op. cit.*, Ch. IX.

⁴⁰ Many of the cabinet portfolios have been held cumulatively by Mussolini himself. At present Mussolini retains only four cabinet posts (Internal Affairs, War, Navy, and Air). On June 9, 1936 he relinquished Foreign Affairs and named his son-in-law (and alleged "crown prince") Count Ciano, to this portfolio.

by the Grand Council, and this body then weeded out all but 400 selected names which were put to a vote. The law provided for the possibility of other lists to be nominated by 5,000 or more voters, but of course this provision has never been used. The list is voted for by males 21 years of age or more, who contribute to a workers' or employers' association, pay direct taxes, are salaried employees, or are clergymen. Married men or widowers with children may vote at the age of 18 if they belong to one of the above categories. By law, if a majority of voters disapproved of the party list another would be prepared and submitted. Actually this cannot take place.

This Chamber was used chiefly to give unanimous approval to the decree-laws previously decided upon by the ministers. On March 28, 1936, Mussolini announced the imminent replacement of the Chamber by a new body to be called "The Chamber of Fasces and Corporations" to be formed of delegates from the twenty-two corporations described below. This is in line with Fascist theory but can hardly make any practical difference in the working of the dictatorship.⁴¹

The civil service was placed under party control by a decree of December 30, 1932. In the course of the next few years it was almost completely staffed by young party members. The judiciary also was brought into line, and after an attempt on Mussolini's life in 1926, a Special Tribunal for Defense of the State was created.⁴² This is a semi-military body with summary jurisdiction and the right to condemn to death persons charged with subversive activities. There is no appeal from its decisions. An Associated Press dispatch of November 13, 1936 quoted "official sources" as authority for Mussolini's decision to abolish the existing court system altogether, including the Special Tribunal.⁴³

Local government needed few changes as it was already highly centralized. By 1928 all elected bodies had been replaced by appointed councils under centrally appointed officials, the Prefect in the province, and the Podestà in the municipality.

⁴¹ This is true because the chamber was already under Fascist control, through the election system described above.

⁴² See Finer, *op. cit.*, pp. 241ff.

⁴³ See *New York Times*, November 14, 1936.

It should be observed that the Fascist Party and the state have become synonymous in Italy, legally as well as actually. This situation may be contrasted with that in Russia where the Communist Party controls but where, *as a party*, it does not occupy a position of automatic supremacy under the law.⁴⁴ In Italy the chief governing body of both party and state is the Grand Council of Fascism established by a law of December 9, 1928. Its ex-officio president is the *Capo del Governo* who convenes it and controls its business. It has five life members, the Secretary of the Fascist Party, the four leaders of the March on Rome, and a number of ex-officio members, mainly the ministers, as well as five or six members nominated for a three-year term by *il Duce*. The absolute control of this body by the latter is obvious.⁴⁵

The party is now a consecrated fellowship of the most thoroughly convinced Fascists sworn to absolute loyalty and obedience to *il Duce* and recruited almost entirely from the young graduates of the Fascist youth organizations. The party constitution is arranged so that all power heads up to the Leader. Its membership, now in the neighborhood of 2,000,000, is increasingly "proletarian" in origin. Finer points out that this may eventually have an important effect on the future policies of the Fascist government.⁴⁶

Finally we should note that the Italian totalitarian state is also the corporate state. That is, all economic and cultural activities are organized and under state control. Syndicates of workers and of employers exist in each district for each trade. These syndicates (which may include as few as 10 per cent of all, in the case of both workers' and employers' syndicates) are the sole bargaining authorities in wage disputes and other differences. Members need not be Fascists but may be removed if "unpatriotic" or "immoral." Officials of these syndicates must be approved by state, i.e., Fascist, authorities. All the syndicates of a trade are grouped into a Federation. These in

⁴⁴ Unless, by inference, it does so under the new constitution. *Supra*, p. 42.

⁴⁵ See Finer, *op. cit.*, pp. 276ff.

⁴⁶ *Ibid.*, p. 372.

turn are gathered into nine Confederations, eight of which represent industries, agriculture, commerce, and finance; the ninth represents the liberal professions. Above all are the Corporations, each of which is supposed to provide for integration within an entire trade or industry, and to contain representatives of employers, employees, consumers, and the party. They are to decide very important matters, actually to plan the whole economy of the industry, subject to the approval of the National Council of Corporations, and finally, the government. A Ministry of Corporations was created in 1923 but the scheme has not yet been completed.⁴⁷

The syndicates, at the bottom of this hierarchy, have long been in actual existence and include, it is estimated, about two-thirds of all workers and their employers. Their chief function is the bargaining over working conditions and wages. If an employees' and employers' syndicate in a given trade cannot reach an agreement there is appeal to a Labor Court whose decision is final. It is claimed that the decisions of these courts are not infrequently favorable to labor. As in Germany, labor has been pleased by at least one policy of the new order, the refusal to allow the dismissal of employees in order to make use of labor-saving devices.

Germany

Like Italy, Germany as a nation is the product of the nineteenth century. Like Italy, until recently it was a congeries of big and little states under the rulership of hereditary princes, free cities, and prince-bishops. There was no cohesion and no feeling of national unity, merely a vague allegiance to the Emperor who had, in fact, no power outside of his own personal dominions. The Holy Roman Empire, long dead, was buried by Napoleon who was the unwitting inspiration for a new German nationalism. His suppression of some of the smaller German states and his army of occupation gave Germans, for the first time, a feeling of unity in the face of a common disaster and a determination to organize effectively against the foreign foe.

⁴⁷ See Finer, *op. cit.*, Ch. XVII, and Ogg, *European Governments and Politics*, p. 838.

Especially was this the case with Prussia, which had already begun to expand under Frederick the Great in the eighteenth century. The victory at Waterloo resulted in further additions to Prussian territory, and in the establishment of a German Confederation under the joint hegemony of Austria and Prussia. This scheme proved abortive because of Austrian and Prussian rivalry, which resulted finally in the expulsion of the former and the definite achievement of Prussian leadership in Germany. The architect of the new Germany was Bismarck who engineered the Austro-Prussian War in 1866 in order to lay the foundation for his monumental edifice which henceforward would be capped by Prussia instead of Austria. Napoleon III managed to prevent an immediate unification of all Germany following this war, but the indomitable Bismarck gained his end by means of the Franco-Prussian War of 1870. No obstacle remained, and the German Empire was proclaimed at Versailles in 1871.

Meanwhile, governmental development in Germany had not kept pace with unification. The revolutions of 1848 had resulted in German upheavals which were uniformly unsuccessful. A popularly elected convention had met at Frankfort to devise a liberal Constitution in 1848, but its members were doctrinaires and ignorant of revolutionary technique. The convention lacked the support of the German masses, and when the ruling class failed to cooperate, it dispersed without having accomplished anything except the sop which the King of Prussia threw to the democrats in the form of the Prussian Constitution of 1850. This provided for a bicameral Parliament with a lower Chamber elected by an elaborate system of suffrage weighted heavily in favor of the larger taxpayers. This Constitution was carefully devised so that no real power belonged to the popular House.

In 1867, Bismarck drew up a Constitution for the North German Confederation; and this, with minor changes, became the Constitution for the new Reich in 1871. The King of Prussia became German Emperor and as such, convened the Bundesrat and Reichstag (the two legislative chambers), appointed the Chancellor (Prime Minister) and was head of the

army and navy. The Chancellorship was an office "tailored by Bismarck to his own measure." This dignitary was the absolute ruler of the ministers in charge of the administrative departments. He, in turn, was responsible only to the Emperor. In practice he was almost always the Prussian Premier as well as Chancellor of the Empire. He presided over the Bundesrat. During the long Chancellorship of Bismarck, which lasted until 1890, he inspired nearly all legislation. Prussian hegemony was inevitable. Prussia was by far the largest German state and all movements toward German unity had been made under her leadership. This dominance was carefully protected by the make-up of the upper chamber or Bundesrat which resembled an international conference more than it did a legislature. It consisted of a collection of deputations representing the various German state governments. Each state had its appropriate number of votes, Prussia having 17, the largest number. Bavaria, next largest, had only 6. The constitutional provisions for amendment were such that Prussia alone could veto any change, as could a union of the South German states.

The Reichstag was the popular national body. Its membership of 397 was elected for a five-year term by direct secret ballot of all male citizens 25 years of age or older. If no candidate in a district received a majority, a second election was held two weeks later to give the voters a choice between those two who had received the largest pluralities. At the start the Reichstag was truly representative on a population basis; but it became less so as the cities grew and the districts remained unaltered in size. This tended to favor the rural and more conservative areas. In any case, the Reichstag was impotent in the face of a determined Chancellor who acknowledged no responsibility to it and would not resign as the result of a successful interpellation but on the contrary could at any time procure its dissolution. Unable to control the purse and not well rooted in popular sentiment, the Reichstag was the mere symbol of democracy with little of its substance.

Why were the German people content to accept autocracy? Certainly not because of backwardness in education or technology. Chiefly, it would seem, because the German autocracy

had been so very successful first in unifying Germany and then in providing the necessary environment for German commercial and industrial development. Only the more visionary and doctrinaire could complain of the absurdities of a twentieth-century autocracy, the overweening pride of the aristocracy, or the impotence of the Reichstag, in view of the enormous success of the government in gaining colonies, foreign trade, and "a place in the sun" among the other Great Powers. Furthermore, social services were not neglected, and the administration, unlike that of the old regime in France, was neither corrupt nor inefficient.⁴⁸

It seems probable that the German imperial system might have lasted indefinitely had not the Central Powers lost the war. It has been suggested by German historians that it might have outlasted even that disaster but for the statement of the Allies, and of President Wilson in particular, that peace would be concluded only with a democratic government. Frantic last-minute efforts by Prince Maximilian of Baden, the Chancellor, to accomplish reforms that would meet Wilson's demands and stem the rising tide of unrest in Germany, were unavailing. The Emperor was compelled to abdicate and the Chancellor resigned on November 9, 1918, in favor of the leader of the Social-Democratic Party, Friedrich Ebert. The latter at once formed a Provisional Government entirely Socialist in personnel⁴⁹ and issued a proclamation promising to convoke a Constituent Assembly, democratically chosen, to devise a new Constitution.

Ebert's government was ill-fated. Faced with the necessity of dealing with constant Communist agitation and uprisings at home, and forced to accept what the German people felt to be the outrageous demands of the victorious Allies, it could scarcely hope for popularity. Nevertheless, the Constituent

⁴⁸ Accounts of the government of the Hohenzollern Empire are to be found in Ogg, *European Governments and Politics*, Ch. XXX; H. A. Finer, *Theory and Practice of Modern Government* (New York, 1934), Pt. V, Ch. III, Pt. VI, Ch. II and Ch. VII, pp. 863-874; Munro, *op. cit.*, Ch. XXXI.

⁴⁹ Besides Ebert, the provisional government contained two other Social-Democrats of the majority faction, and three Independent (left wing) Socialists. The latter resigned and withdrew their support in December after the government had forcibly suppressed a Communist revolt in Berlin.

Assembly was peacefully elected on January 19, 1919, under a system of proportional representation and by universal suffrage. In this Assembly only the Spartacists (Communists) were unrepresented because they boycotted the election. No party gained a majority, but the Majority Socialists had the largest block of seats, 163. Hence they were able to dominate the scene, though only with the help of at least one other non-socialist party. The Constitution adopted by this Assembly and officially promulgated on August 11, 1919, provided for a quasi-federal republican democracy. It was very long and detailed.⁵⁰

Its sources of inspiration were varied. They included England, France, Switzerland, the United States, and the pre-war German system as well as the doctrinaire plans of the German democrats. The Presidency was more American than anything else. The directly elected President was not only a nominal executive like the President of France, but under the famous Article 48 of the Constitution he could transform himself into a temporary dictator. The parliamentary or Cabinet system was somewhat like that of the old Empire except that now, as in England and France, responsibility was to the legislature. The provisions for initiative and referendum were reminiscent of Swiss practice. Constitutional amendment was obtainable by a simple two-thirds vote in each Chamber, but the Reichsrat (upper Chamber) could force a popular referendum. Amendment could also be accomplished by popular initiative. This, too, suggests a Swiss source of inspiration.

The fundamental rights of citizens were covered in a very long and detailed passage. Frequently, however, the language employed suggested an ideal rather than an enforceable command. The influence of socialist doctrines is to be seen in the protection of the rights of labor and in the constitutional permission given the government to socialize appropriate industries. Provisions were included guaranteeing sickness and old age insurance. Also, workers' and economic committees were required to represent both workers and employers in a series

⁵⁰ See H. L. McBain and Lindsay Rogers, *The New Constitutions of Europe* (Garden City, New York, 1922), pp. 176-212.

of parallel councils, capped by a National Economic Council. The chief function of this body was to advise the legislature in matters of labor laws, tariffs, and the like.

Federalism, as indicated above, was weakened but not abolished. There were explicit provisions as to the kind of government the *Länder* were to have, and the Reich government could alter their boundaries. Although the *Länder* had residual powers, the Reich retained the most important and many were concurrent, Reich action, if any, taking legal precedence. The powerlessness of the state governments in case of a conflict with Reich authorities was exemplified in 1932, when the Prussian government (Social-Democratic in composition) was superseded by Reich Chancellor von Papen, authorized by presidential decree to act as National Commissioner for Prussia.⁵¹

There were undeniable faults in the Weimar system.⁵² There were a number of political parties in the country, of considerable strength. This meant that under the list system of proportional representation no one party could hope to dominate the legislature and control the executive. Coalitions were inevitable; and the compromises and transactions requisite to the formation of any workable coalition gave the appearance of weakness to each successive Cabinet. The German democracy had no strong popular roots. As in Italy, the failures due to unavoidable circumstances were attributed to democracy in the abstract. The various Cabinets had to try to meet reparations payments and reorganize the disjointed German economy at the same time. The Republic had, above all, to bear the odium of national defeat. Strong stable coalitions of parties were impossible because of jealousies, and the left was badly divided even after National Socialism became a real threat.

The rise to power of the N.S.D.A.P. (National Socialist German Workers' Party) was a slow and complicated process.⁵³ One might have supposed that the new republic had

⁵¹ For a good brief account of the Weimar Constitution and Republic see F. A. Ogg, *European Governments and Politics*, Chs. XXX-XXXIII.

⁵² See F. F. Blachly and M. E. Oatman, *The Government and Administration of Germany* (Baltimore, 1928).

⁵³ See Konrad Heiden, *A History of National Socialism* (London, 1934). This is an English translation of the author's two books, *Geschichte des Nationalsozialismus* (1932) and *Geburst des Dritten Reiches* (1934).

already a sufficiency of parties to meet the demand for programs to suit every taste. But there were many in Germany unsatisfied with the new form of government and the distressing economic situation. Chief among these were war veterans, smarting under the peace terms, feeling their old world shattered, often unemployed and having a clear conviction of one thing only—that the times were out of joint. The only existing political party that agreed with them in refusing to accept the peace was a tiny group in Munich, called the German Workers' Party, under the presidency of one Anton Drexler. This party included certain veterans, notably Captain Ernst Roehm, founder of the Storm Troops. He began at once to organize the party as a counter-revolutionary force.

To this small group was added Adolf Hitler, on Drexler's invitation a member of the inner council of the growing party. Together with Gottfried Feder and Drexler, Hitler assisted in drawing up the "Twenty-Five Points," the program of the German Workers' Party. Hitler rapidly advanced toward party leadership. This was due largely to his genius for propaganda, crude, prejudiced, and tirelessly reiterated. Hitler's rise to power was not uncontested, especially by those party members who still regarded their group as leftist. However, Hitler's victory in the party was demonstrated by his election as president in July, 1921. The inflation of 1923, which ruined the large rentier and pensioned class, gave Hitler a color of excuse for attributing the disaster to "Jewish stock exchange swindlers."⁵⁴ This attracted many more followers to his banner. The triumph of Fascism in Italy at this time gave further inspiration to the party. Moreover, donations were being given by German business men who were well assured that National Socialism was somewhat of a guarantee against Socialism. In this same year (1923) came Hitler's abortive *Putsch* on November 9. It was ill-timed, and a failure. The consequence was Hitler's trial for treason, which ended in a sentence to a year's imprisonment.

But the movement was far from dead. Hitler emerged from prison with his party even better organized than before.

⁵⁴ Heiden, *op. cit.*, p. 86.

Its growth became phenomenal.⁵⁵ It is questionable whether the party program by itself contributed much to this growth, although it contained many items to attract the lower middle classes, who, whether veterans or not, became the backbone of the movement.⁵⁶ More was due to the unflagging zeal of Hitler, his remarkable power of mob oratory, and the ruthless tactics of his Jew-baiting, Communist-killing Storm Troopers. The latter had become so numerous and defiant that they were a menace to law and order long before the government took any action against them. Another factor in the phenomenal growth of the party in the years 1930-1933 was the world-wide economic crisis, which caused a tremendous increase in unemployment and in the economic degradation of white-collar workers and small capitalists, as well as misery among the peasantry. From all of these dismayed and bewildered groups Hitler gathered new followers.⁵⁷

In the Reichstag elections of 1930, the N.S.D.A.P. polled 6,400,000 votes and gained 107 seats, whereas in 1928 they had seated only 12 members. This was very embarrassing to Chancellor Bruening, who remained in power only with the support of the Social-Democrats. From now until Hitler's complete triumph, government was carried on chiefly by means of presidential decrees issued under the emergency powers granted by the Constitution. Hitler's popularity continued to rise. On April 10, 1932, he received 13,400,000 votes in the second poll of the presidential election. On April 14, Chancellor Bruening attempted, too late, to suppress the Nazi Storm Troopers and Special Guards. In spite of his having secured Hindenburg's re-election as President, Bruening fell from favor and was replaced on May 31 by Franz von Papen, an aristocratic member of the Centre (Catholic) Party. Even with the aid of Kurt von Schleicher, Papen failed to mold a government with

⁵⁵ By 1926 its membership was about 17,000; by 1927, 40,000; by the summer of 1929, 120,000; and after the agreement with Hugenberg of the German Nationalist Party it climbed in 1930 to 210,000. Heiden, *op. cit.*, pp. 111-112.

⁵⁶ See *infra*, Chapter IV, pages 108 ff.

⁵⁷ For an interesting description of these conditions, in the form of fiction, see Hans Fallada (*pseud.*), *Little Man, What Now?* (New York, 1933).

any real support in the Reichstag. The President dissolved the Reichstag in June, and on July 31 the Nazis more than doubled their strength at the elections, winning 230 seats. Hitler was now determined to have all or nothing, and steadily refused to cooperate with any one else as Chancellor. Another dissolution came in September, and this time the Nazis suffered a slight setback, winning only 197 seats, while the Communists showed a gain. Chancellor von Papen resigned in November, to be succeeded by Schleicher who was no more successful.

On January 30, 1933, the aged President named Hitler Chancellor. It was now necessary to obliterate the opposition, and this could be done only by new elections which would give the N.S.D.A.P. a clear majority. As it was, the cabinet contained more Nationalists than it did members of Hitler's party. The necessity was accomplished by the dissolution of the Reichstag following the mysterious burning of its palace, and the ensuing campaign with the terrorization and suppression of Communist and Social-Democrat meetings. The elections on March 5 gave Hitler and his Nationalist allies a total of 341 seats out of 648. Private rights had already been suspended by decree, following the Reichstag fire, and the new government proceeded at once to establish a dictatorship. The Enabling Act was passed instantly.⁵⁸ Then the opposition parties of the left were suppressed and Communist property was confiscated. The boycott of Jews came on April 1. A month later the Trades Unions were suppressed. Among many other repressive measures was a law of July 14, forbidding the formation of new political parties.

On November 12, 1933, a new election for the Reichstag was held, together with a plebiscite of confidence in the new government. This was held after the Fascist pattern. That is, only Nazi candidates were permitted, and the party list received 93.5 per cent of the vote cast, as did the affirmative side in the plebiscite. How accurately these figures represented the popularity of the Hitlerite government it is impossible to estimate. At all events the Weimar democracy had been supplanted by a

⁵⁸ See *infra*, Chapter IV, page 108.

totalitarian regime which could count upon the army and all the forces of the state to keep it in power, while giving it the opportunity to suppress all opposition and to secure a complete monopoly for its propaganda.⁵⁹

⁵⁹ An excellent account of the history of Hitler's rise to power is C. B. Hoover, *Germany Enters the Third Reich* (New York, 1933). See also Konrad Heiden, *op. cit.*, and H. F. Armstrong, *Hitler's Reich* (New York, 1933).

CHAPTER III

BASIC DEMOCRATIC DOCTRINES

Political doctrines may be either concepts which determine the nature of a new governmental structure, or ideas which serve as apologia for political transformations already accomplished. Quite often they are both. Thus, the Americans and the French in connection with their respective Revolutions, the Communists in Russia, and, to a lesser extent, the Italian Fascists and the German National Socialists, professed doctrines which indicated the general direction of the changes brought about when each of these groups achieved power. Any changes which were not implied in the original doctrines were explained by the party apologists as corollaries of these doctrines; or if this could not be done, they were simply added to the body of beliefs to be accepted by the faithful.

There is a constant interaction between ideas and institutions. It is therefore necessary, in examining political institutions, to examine the ideas which animate them. The democratic and the totalitarian doctrines are of primary interest to our own times; for the conflict between these two types of ideas and the institutions to which they are related, is the greatest drama of the present age. Only a short time ago the democratic point of view seemed destined to conquer most of the world within a few years. Today, its deadly enemy, totalitarianism, is winning spectacular victories. Is democracy based upon obsolete concepts? Should some of its basic ideas be modified? In any case, can it survive, or is the totalitarian state destined to be its successor? Can some compromise be reached between democracy and totalitarianism?

Since a knowledge of both democratic and totalitarian philosophies and their actual results in political institutions is necessary to an intelligent evaluation, the attempt to answer the questions set forth above will be postponed until these ideas

and institutions have been examined. The present chapter will discuss the doctrines which, implicitly or explicitly, have influenced many constituent authorities and many millions of people throughout the world in establishing and supporting political institutions.

A. Democratic Doctrines¹

Man in the State

The word democracy means, as everyone knows, government by the people. The rule of the people is justified on the ground that government exists for the benefit of all, and that all men are or should be equal as regards relationship to the state. This latter doctrine has found many striking expressions. "Men," says the French Constitution of 1791, "are born and remain free and equal in rights . . . All citizens being equal in its eyes (the eyes of the law) are equally eligible to all public dignities, places, and employments, according to their capacities, and without other distinctions than that of their virtues and their talents." The American Declaration of Independence expresses the same thought when it says: "We hold these truths to be self-evident: that all men are created equal. . . ."

It must be understood that the equality of men, however fantastically certain writers may have interpreted it, has not meant to the founders of democratic states an imaginary equality of all personal traits and capacities. Men differ infinitely as individuals, but as members of the democratic state they are equal. That is, every citizen has the same rights and responsibilities as every other citizen, such as the right to vote, the right to a fair trial before the courts, the obligation to

¹ For a discussion of the theory and development of democracy see H. A. Finer, *The Theory and Practice of Modern Government* (New York, 1934), Ch. 1; Harold Laski, "Democracy," *Encyclopaedia of the Social Sciences* (New York, 1930-1935), Vol. V, pp. 76-84 (Note bibliography); J. S. Mill, "Representative Government" in *Utilitarianism, Liberty and Representative Government*, Everyman's Library (London, Toronto and New York, 1910); C. E. Merriam, *American Political Ideas 1865-1917* (New York, 1923), *passim*; "Socialism, Fascism, and Democracy," *The Annals of the American Academy of Political and Social Science* (July, 1935), Vol. CLXXX, pp. 31-39, 47-54, 97-101, 129-137.

perform civic duties, pay taxes, and so on. There are always qualifications with respect to some of these rights, such as the attainment of a certain age before voting. The ability to read and write or to pass a certain kind of examination may also be requirements. The important consideration for democracy is that these requirements be so arranged as not to disqualify any important group or class, especially the poor.

In practice, democratic theory has often been ignored to a certain extent in states claiming to be democracies. It has not been unusual to confine the franchise to owners of land, or taxpayers, or even church members. Only recently have democracies realized the complete lack of logic in refusing the vote to women.² The doctrine of human equality was accepted by many Americans who also accepted the existence of slavery.³

Popular Sovereignty

If men are essentially equal there can be no excuse for a ruling caste. Equality can be maintained only if all share in ruling. This was clearly expressed in the French Constitution of 1791, which said: "The source of all sovereignty is essentially in the nation; no body, no individual may exercise authority that does not proceed from it in plain terms." The idea of popular sovereignty was expressed in the preamble to the Constitution of the United States: "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Popular sovereignty, like other doctrines, can be and is expressed in institutions as well as words. The government of England is a case in point. Although the King is still called "Sovereign," there has been a definite institutional trend toward real democracy. As extensions of the suffrage have made the House of Commons a genuine representative of the

² Women are still voteless in three important democracies: France, Switzerland, Belgium.

³ See C. E. Merriam, *A History of American Political Theories* (New York, 1906), Ch. VI.

British people, the House of Lords has dwindled in importance. Without serious change in external forms, popular sovereignty has become firmly established.

Representative Government

Although certain theorists, notably Rousseau, have held that true democracy can result only when the people act directly to govern themselves by means of universal assemblies, representative government has been accepted as a matter of practical necessity. However other governmental officials are recruited, at least one house of the legislature must be elected by popular vote. The representatives may be chosen because of their personal appeal to the voters, or because they are pledged to follow a certain leader or a certain party program. An important feature of representative government is the frequent election of legislatures so that changes in popular ideas or sentiments may be duly recorded and reflected in governmental action.

Majority Rule

A necessary corollary of democratic theory is the belief in the rule of the majority. Unanimity as to leaders or policies being impossible of attainment, the obvious solution, if anything is to be done, is to allow a majority to make the decision. These decisions must be respected by the minority, which, however, must be allowed to agitate and attempt to attain political power by peaceful and legal methods. Majority rule is admittedly a device which can be defended simply because it is better than any possible alternative, admitting the premises of democratic theory.⁴

Universal Suffrage

The rule of the majority is to be accomplished by the process of universal suffrage, which gives every qualified person,⁵

⁴ But see articles by Walter Lippmann, "Bryan and the Dogma of Majority Rule," and "H. L. Mencken," in *Men of Destiny* (New York, 1928), pp. 45-70. See also Finer, *op. cit.*, pp. 69-71.

⁵ Disqualified persons ordinarily include those under a certain age, usually 21 but sometimes as low as 18; convicted criminals under sentence; the inmates of public charitable institutions; those certified as insane; bankrupts (in some places); occasionally public officials and judges; aliens; those who have no established residence in the constituency.

no matter how humble, a voice in the government. The voters always participate in government at least to the extent of electing legislators. They may also directly elect executive and administrative officers. In many places they also act to approve constitutional changes or even ordinary laws, and to initiate legislation, as well as to recall officials before the normal expiration of the term of office.

The Ballot and Elections

Nowadays the secret ballot is considered a necessity to democratic governments because it minimizes fraud and intimidation. Elections are normally held by dividing the country into districts according to population and electing one representative for each district. This system is defended on the ground that the legislators are chosen to represent the people in their capacity as citizens, without regard to their especial interests as members of some profession or economic class. It is the totality of the individual which is thus represented, or better, those interests which he has in common with every one else rather than those which distinguish him from his fellows.⁶

Education and Free Speech

The spread of the suffrage and the growth of popular education have everywhere gone together. It is generally held that democracy is a reality only where there exists an educated, or at least literate, body of voters. In order that people might be capable of exercising the suffrage intelligently, in order that they should know the issues involved in the elections, in order that they should be able to read about these issues and discuss them, a system of universal education has been considered essential wherever democratic doctrines have been expressed in

⁶ Because the single-member district system results in a representative assembly which distorts the party distribution among the electorate, and is especially unfair to minority parties, systems of "proportional representation" have been devised which will make the legislature a fairly exact image of the electorate. See *Finer, op. cit.*, pp. 570-580; A. Headlam-Morley, *The New Democratic Constitutions of Europe* (London, 1929), Ch. VI; H. F. Gosnell, "Proportional Representation," *Encyclopaedia of the Social Sciences*, Vol. XII, pp. 541-544. It should be noted, however, that proportional representation has its own faults. The experience of Germany has demonstrated these.

institutions since the time of the American Revolution. The idea spread rapidly that there should be free primary and even secondary education for all, that a minimum of education should be compulsory for all children, and that even free higher education should be available for those qualified for it. It was believed that, with free education, a free press, freedom of assembly and speech, it would be possible for a free people through their choice of a government at the polls to develop a rational and consistent social policy ever looking toward an increase in the general welfare. This may be considered a corollary to the main body of democratic doctrine.

Parties

Public policy in a representative democracy is advocated by political parties. These, ideally, are groups of people united to promote the general welfare by means of certain policies which they seek to have adopted by government, and organized to secure this end by promoting the election of representatives pledged to the party platform. Without parties having a real basis in the electorate, representative assemblies tend to disintegrate into groups of members banded together temporarily for personal reasons.⁷ Representative government works most smoothly under the two-party system. This exists when all but two parties are negligible, and when one party in the legislature represents the majority of the voters on the important questions of the day while a strong minority party is able, without defeating majority plans, to criticize them and perhaps, by developing new and better policies that offer a stronger appeal to the electorate, hope to become itself the majority party. When there are many parties of relatively equal strength, coalitions of parties are needed to carry on government, and these are notoriously weak and fragile. It is one of the prime functions of the political party to educate the electorate as to the principles for which it stands. In order that parties may function properly there must be freedom of speech, of the press and of assembly.

⁷ This state of affairs exists to some extent in France and was especially true of the pre-Fascist Italian Parliament.

Law

Law in a democracy is conceived as the embodiment of the general will or the general sense of right of the community. This general will is discovered by the election of members to legislatures so that all citizens, through their representatives, participate in the formulation of law.

Constitutionalism

Democratic doctrine assumes that the work of government shall be carried on in accordance with a constitution or legal plan prescribing the organization, powers and duties of the important branches of government. The constitution may be embodied, at least as to its main features, in a special law amendable only by extraordinary process. In this case it is known as a written constitution. It may, on the other hand, be the product of a slow evolution and consist, in important respects, of conventional behavior on the part of authorities. In this case it is called "unwritten" although there may also be important portions of it embodied in written laws. The chief characteristic of the unwritten constitution is that it is amendable by ordinary legislative process. Modern absolutisms also have a "constitutional" government but might conceivably dispense with the constitution, while a democracy is hardly possible without it in the great socio-political groups of the present day.

The Legal State

Closely connected with constitutionalism is the concept of the legal state, which means that the whole governmental system is based upon and operates under law. No agency of the state is above or superior to law, except that legislatures are empowered by a prescribed process to change the law. The administration must carry out its functions in accordance with the law. Any action it takes outside the law is *ultra vires*, and may be disallowed by the courts. Tribunals are set up (either administrative or ordinary courts) before which individuals may plead that administrators have acted beyond their authority. In this way the latter are kept within the legally prescribed

scope of their powers and functions. Judges, Presidents, Governors, and other high executive officers may be impeached (i.e., tried by the legislature) and removed for misuse of their authority. In the parliamentary system, Kings or Presidents act only through ministers who are responsible to the legislature and who may be voted out of office or impeached for misuse of power. Members of legislatures are not only judged politically by the voters at election time, but are disciplined by the legislature itself for illegal actions affecting their functions, such as the acceptance of bribes. Thus all branches of government are under the law in the legal state.

The Guarantee of Fundamental Rights

Democratic doctrine has long held that a primary purpose of government is the preservation of individual rights. These rights are often held to be "natural" and eternal, and to be untouchable by any organ or power of government. Consequently they are to be found enumerated in most democratic constitutions. In England, Magna Carta and the Bill of Rights; in the United States, the Bill of Rights of the national and State constitutions; in France the Declaration of the Rights of Man and Citizen; and in other countries similar provisions guarantee these rights. Among the most cherished fundamental rights are those of free speech, a free press, free assembly, a fair trial in an open court, and security of person and property from arbitrary action by officials. Curiously enough, the Declaration mentioned above is not included in France's present Constitution, but most authorities agree that it is still in force as an "organic" law or perhaps even as a sort of super-constitutional law.⁸ This is borne out by the action of the courts which have based important decisions upon such specific clauses of earlier constitutions as the following: "Judges . . . cannot stop or suspend the execution of any law, nor cite before them the administrators on account of their functions."⁹

⁸ See E. M. Sait, *Government and Politics of France* (Yonkers, New York, 1920), pp. 19-21.

⁹ See Constitution of the Year III, Title VIII, Sec. 203; translation in F. M. Anderson, *Constitutions and Other Select Documents Illustrative of the History of France 1789-1907* (Minneapolis, 1908), pp. 212ff.

That the Constitution of the Third Republic did not repeat the Declaration of the Rights of Man and Citizen was doubtless due to the fact that the Assembly which adopted this Constitution contained a large royalist element and that a majority of the members probably did not expect the Constitution to be permanent. Indeed, at one critical moment the change of a single vote might have destroyed the hopes of the republicans.¹⁰ The occasion then was not propitious for debates upon fundamental rights and republican principles.

Separation of Powers

The doctrine of the separation of powers is found in various forms in various countries. In the American version, it stands for a belief that by having the law-making function in the hands of a representative elected body, the executive and administrative functions separate and distinct from the function of making the laws and in separate hands, and the judicial function entirely distinct and separate from both of the others, the citizen will be protected adequately against the tyranny that may result when all three powers of government are in the same hands. The legislature will make the laws; the executive with the administrative organs will execute them; and the judicial authority will decide the cases arising under the laws.¹¹ Each of the three "powers" of government acts freely in its own sphere, beyond the influence of the other branches. As a consequence each is forbidden to infringe upon the preserves of another and in addition can act as a check upon the other's action. That is, the additional doctrine of "checks and balances" flows naturally from the separation of powers. These doctrines were based upon "a Frenchman's misinterpretation of the British Constitution."¹² They appealed strongly to the

¹⁰ The moment referred to is that of the vote upon the Wallon Amendment, which by fixing the President's term of office and making him eligible for re-election introduced by implication the principle that the republic was to be permanent. See F. A. Ogg, *European Governments and Politics* (New York, 1934), Ch. XXII.

¹¹ The new post-war European democracies for the most part favored a parliamentary system with responsible ministers.

¹² Montesquieu, whose *Spirit of the Laws* exercised a great influence on American thought. See Merriam, *A History of American Political Theories*, p. 79 and *American Political Ideas 1865-1917*, pp. 140-144.

Americans who were especially afraid of a despotic executive. In practice the party system mitigates the effect of this separation, as the chief executive is normally the leader of the party having a majority in the legislature.

Judicial Review

Another American contribution to democratic theory was the development of judicial review, that is, the assertion that the courts must, when necessary to a decision in an actual case, review the acts of the legislatures with regard to their constitutionality and refuse to apply them if they are found to be unconstitutional. This doctrine arose in connection with colonial charters and in the State courts after independence. The first important case in which it was applied to an Act of Congress was the famous case of *Marbury v. Madison*, decided in 1803.¹³ The doctrine, while entirely compatible with the "checks and balances" system, is hardly so compatible with the separation of powers, because it enables the courts to act as a third house of the legislature at times and to overthrow laws for reasons that are essentially political. This they do by the interpretation of certain clauses of the United States Constitution, notably the "due process" clauses of Amendments V and XIV. This practice, although frequently admired by foreign observers, has not usually been copied by modern constitution-makers even when a written constitution has been set up and declared to be superior to ordinary law. An exception to this was the Weimar Constitution of Germany, which expressly provided for judicial review. The German High Court was given express jurisdiction only over state laws, but declared itself free to discuss the constitutionality of Reich laws as well. This interesting development was cut short by the National Socialist Revolution.¹⁴

¹³ For a full discussion of this case and surrounding circumstances see A. J. Beveridge, *The Life of John Marshall* (Boston, 1916), Vol. III, Chs. II and III.

¹⁴ Another seeming exception is the Czechoslovak Republic whose Constitution provides for a special court of constitutional review, with a procedure differing in some respects from the American. This court has never acted and appears to be already obsolete. See Headlam-Morley, *op. cit.*, pp. 92-93; Ogg, *op. cit.*, pp. 693-695; A. Zurcher, *The Experiment with*

Economics and the State

Despite the doctrines of a few democratic theorists, a few sporadic attempts at collectivism in some form or other, and a present-day trend in the direction of state intervention in the economic sphere, the democratic state has been traditionally one which fosters and protects an individualistic economy. From Locke onward, democratic thought has stressed the importance of individual rights, including the right to acquire and possess property, by means and under conditions sanctioned by law. Free and equal individuals were to attain their ends in the acquisition of property largely through the right to make contracts with one another, which the state would enforce. The rights to hold, use and enjoy property were to be protected by the state, without interference except in very unusual cases.

Laissez Faire

Throughout the whole of the past century, political-economic thought was dominated by the doctrine of *laissez faire*. This doctrine of non-interference rested upon the assumption that the economic affairs of mankind will in the main take care of themselves without the intervention of the state or other coercive authorities, except for such purposes as the enforcement of contracts and the prevention of fraud.¹⁵ This assumption, in turn, was based upon certain accepted notions as to the nature of man and the nature of economic processes, which may be summarized as follows: The struggle of each individual for his own ends, under free conditions and by means of the right to enter into contracts, will result in the greatest possible good for the greatest possible number of individuals, and hence in the welfare and progress of society. The individual, driven by the urge of private gain, will extend his productive effort to the utmost. The laws of supply and demand will induce him to

Democracy in Central Europe (New York, 1933); F. F. Blachly and M. E. Oatman, *Government and Administration of Germany* (Baltimore, 1928).

¹⁵ This doctrine was first stated systematically by Adam Smith in his *Inquiry into the Nature and Causes of the Wealth of Nations*, first published in 1776. An even stronger individualist was Herbert Spencer. See quotations from his *Social Statics* in Margaret Spahr, *Readings in Recent Political Philosophy* (New York, 1935), pp. 242-262.

produce that which is needed and refrain from producing a useless surplus. The force of competition will compel him to produce economically and sell at the lowest price compatible with profit; or at least this will take place over a period of time. The upholders of this laissez-faire doctrine, believing that the operations of universal economic motives and forces will produce the best possible economy if let alone, oppose not only state regulation, control or ownership of business and industry, but object also to trusts, cartels, syndicates, and other business combines in so far as they tend to restrict competition. This doctrine is applied with many exceptions, especially in the matter of tariffs; but it has been important in the social, political, and economic history of all modern democracies.

From the Laissez-Faire to the Social Concept of Liberty

It should not be overlooked that exceptions to the pure laissez-faire doctrine have become increasingly numerous within the last generation. Experience has proved the premises of laissez faire to be based upon a very artificial concept of humanity, "the economic man," leaving out many human characteristics and assuming an exaggerated economic rationality in human behavior. Unregulated competition has proved to be the cause of much inefficiency and waste. Huge agglomerations of capital in the modern economy, together with the divorce of ownership and control implicit in the great corporation, the financial magic of holding companies, and so on, have given rise to problems not found in an earlier and simpler economy. A seemingly permanent unemployment problem has also appeared. Under these circumstances it has been thought by many that the old concept of natural inalienable personal rights should give way before a concept which holds these rights to be relative to the general good. With the increasingly complex and specialized economy, the interdependence of the whole is realized, as is the necessity for regulation of business and of labor-capital relations to an extent incompatible with the older doctrine.

Accordingly, modern democratic governments, without embracing socialism, have tended more and more to impose

restrictions upon free enterprise with a view toward achieving a socially healthy economy and at least a minimum of economic security for all citizens. These restrictions operate to prevent the free action of labor as well as capital in some cases. The Blum government in France has, for example, forbidden both strikes and lock-outs pending arbitration in the case of wage and other disputes. Governments in all three of the great democracies have embarked upon old-age pension schemes as well as sickness and unemployment insurance. The tendency is also in the direction of public ownership and development of public utilities. A new development found in some countries is the encouragement by the state of producers' and even consumers' cooperatives. These activities have been sharply challenged by laissez-faire advocates as incompatible with democratic doctrine and destined to lead to an eventual collectivism, whether "Fascist" or "Communist." The challenge, however, has not been able to prevent the current general acceptance by many who profess to be democrats, of the belief that the state should guarantee to all at least a subsistence, should provide a large variety of free services, and should attempt to oversee equitable adjustment of economic disputes beyond the mere judicial enforcement of contracts.¹⁰

Conclusions

The theories listed above can be found expressed in words or governmental institutions in all the democratic constitutions established since 1776. Some have been modified in practice and there are many differences of emphasis as between various countries; but the variations remain, generally speaking, within the limits of consistency with these accepted doctrines. Which of the time-honored doctrines can and should be retained, and which modified or discarded, if democracy is to meet the needs of the present and future, will be considered later, after further study of democratic states.

¹⁰ See Woodrow Wilson, *The New Freedom* (New York, 1913); Bertrand Russell, *Skeptical Essays* (New York, 1928), Ch. XIII ("Freedom in Society"); Horace Taylor and others, *Contemporary Problems in the United States* (New York, 1935), 1935-1936 ed., Vol. II, pp. 465-477.

B. Appendix to Democratic Doctrines

The following extracts from representative Constitutions will serve to exemplify the doctrines listed above, and give some idea of the variety of constitutional provisions.

Constitutions of France

CONSTITUTION OF 1791

Law is the expression of the general will. All citizens have the right to take part personally, or by their representatives, in its formation. It must be the same for all, whether it protects or punishes. All citizens being equal in its eyes, are equally eligible to all public dignities, places, and employments, according to their capacities, and without other distinction than that of their virtues and their talents.

The law ought to establish only penalties that are strictly and obviously necessary, and no one can be punished except in virtue of a law established and promulgated prior to the offence and legally applied.

The free communication of ideas and opinion is one of the most precious of the rights of man; every citizen then can freely speak, write, and print, subject to responsibility for the abuse of this freedom in the cases determined by law.

CONSTITUTION OF THE YEAR III

Rights

1. The rights of man in society are liberty, equality, security, property.
2. Liberty consists in the power to do that which does not injure the rights of others.
3. Equality consists in this, that the law is the same for all, whether it protects or punishes.

Equality does not admit of any distinction of birth, nor of any inheritance of authority.

4. Security results from the cooperation of all in order to assure the rights of each.

5. Property is the right to enjoy and to dispose of one's goods, income, and the fruit of one's labor and industry.
6. The law is the general will expressed by the majority of the citizens or their representatives.
7. That which is not forbidden by the law cannot be prevented. No one can be constrained to do that which it does not ordain.

Duties

2. All the duties of man and citizen spring from these two principles graven by nature in every heart:
Not to do to others that which you would not that they should do to you.
Do continually for others the good that you would wish to receive from them.
3. The obligations of each person to society consist in defending it, serving it, living in submission to the laws, and respecting those who are the agents of them.
4. No one is a good citizen unless he is a good son, good father, good brother, good friend, good husband.
5. No one is a virtuous man unless he is unreservedly and religiously an observer of the laws.
6. The one who violates the laws openly declares himself in a state of war with society.
7. The one who, without transgressing the laws, eludes them by stratagem or ingenuity wounds the interest of all; he makes himself unworthy of their good will and their esteem.
8. It is upon the maintenance of property that the cultivation of the land, all the productions, all means of labor, and the whole social order rest.

CONSTITUTION OF 1848

Preamble

1. France is constituted a Republic. In definitely adopting that form of government, it proposes for its aim to move more freely in the path of progress and civilization, to assure a

more and more equitable distribution of the burdens and advantages of society, to increase the comforts of each person by large reductions in the public expenditures and taxes, and without new commotion, through the successive and constant action of institutions and laws, to cause everyone to reach a degree of morality, enlightenment and well-being constantly becoming more elevated.

7. The citizens ought to love the fatherland, to serve the Republic, to defend it at the price of their lives, and to share the expenses of the State in proportion to their fortunes; they ought to secure for themselves, by labor, means of subsistence, and by foresight, resources for the future; they ought to contribute to the common well-being by fraternally cooperating with one another, and to the general order by observing the moral and the written laws which control society, the family, and the individual.

Constitution of Germany

The German Constitution of 1919 contains a Bill of Rights somewhat like that of the Constitution of the United States, guaranteeing freedom of speech, and the like. It contains also a chapter on social relations, including, among others, the following articles:

Education and Schools

- Art. 142. Art, science and the teaching of the same are free. The State guarantees their protection and participates in their cultivation.

The Economic Life

- Art. 151. The ordering of the economic life must correspond to the fundamental principles of justice, with the purpose of guaranteeing to everyone an existence worthy of mankind. Within these limits the economic freedom of the individual is to be safeguarded. Legal compulsion is only permissible in order to realize threatened rights or to serve preponderant requirements of general welfare.

Freedom of commerce and industry is guaranteed in accordance with provisions of the national laws.

- Art. 153. Property is guaranteed by the Constitution. Its content and its limitations are defined by the laws.

Property involves obligations. Its use shall at the same time be a service to the general welfare.

- Art. 155. The distribution and the use of land are supervised by the State in such a way as to prevent misuse, and to serve the purpose of guaranteeing to every German a healthful dwelling, and to all German families, especially those with many children, a homestead for residence and productivity corresponding with their needs. In the homestead law which is to be passed, especial attention is to be given to those who have taken part in war.

- Art. 156. The Reich can take over by law as public property, without prejudice to compensation and with suitable application of the provisions which hold for expropriation, private economic enterprises suitable for socialization. It can engage itself, the states, or the communes, in the administration of economic enterprises and associations, or it may secure for itself in other ways a controlling influence upon them.

In case of urgent need, the Reich can also unite by law economic enterprises and associations on a basis of self-administration, for socio-economic purposes, with the object of securing the cooperation of all productive elements of the population, of giving a share in the administration to employers and employees, and of regulating the production, manufacture, distribution, consumption, price fixing, importation, and exportation of economic goods according to the fundamental principles of social economy.

The cooperative industrial and economic associations, and unions of these, upon their demand are to be incorporated into the socialized economic system, with due consideration of their organization and their peculiar nature.

Art. 157. The forces of labor stand under the especial protection of the Reich.

Art. 159. Freedom of association in order to protect and develop conditions of labor and economic life is guaranteed for everyone and for all occupations. All agreements and measures which attempt to limit or to impede this freedom are contrary to law.

Constitution of England

So much of the Constitution of England is unwritten, and so much of the written portions is now obsolete, that it is difficult to find passages which may be said to express the philosophy of those who made the Constitution—particularly because the Constitution has grown up through centuries, by processes of development and accretion. Yet a few passages may be cited, which fairly represent both the past and the present. Magna Carta is omitted because it was extensively quoted in Chapter I.¹⁷

FROM THE STATUTE OF NORTHAMPTON, 1328¹⁸

Item, it is accorded and established, that it shall not be commanded by the great seal nor the little seal to disturb or delay common right; and though such commandments do come, the justices shall not therefore leave to do right in any point.¹⁹

FROM THE BILL OF RIGHTS, 1688²⁰

. . . The said lords spiritual and temporal and commons . . . declare: That the pretended power of suspending of laws or the execution of laws by legal authority without consent of Parlyament is illegal. . . .

That election of members of Parlyament ought to be free.

That the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

¹⁷ *Supra*, Chapter I, page 7, footnote 2.

¹⁸ 2 Edw. 1. This and the following citations from English constitutional law are taken from *Halsbury's Statutes of England* (London, 1929), Vol. III.

¹⁹ 2 Edw. 1, c. 8.

²⁰ 1 Will. and Mar., sess. 2, c. 2.

That excessive baile ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

FROM THE ACT OF SETTLEMENT, 1700²¹

And whereas the laws of England are the birthright of the people thereof and all the Kings and Queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws. . . .

The said lords spiritual and temporal and commons do . . . humbly pray that all the laws and statutes of this realm for securing the established religion and the rights and liberties of the people thereof and all other laws and statutes of the same now in force may be ratified and confirmed. . . . The same are by his Majesty by and with the advice and consent of the said lords spiritual and temporal and commons and by authority of the same ratified and confirmed accordingly.

To the political philosophy expressed, and the basic rights established, in the historical constitutional documents from which the foregoing quotations were taken, additions are often made by statute, custom, convention, and judicial decision. The entire field covered by the constitutional law of England is so much wider than that covered by the constitutional law of any other country, as to render any adequate description in a short space quite impossible. Only one illustration of the remarkable manner in which the philosophy of a newer age superimposes itself upon that of an earlier time without quite destroying the older viewpoint can be considered here; namely, the constitutional doctrine of the relations between the Sovereign and Parliament. Of this, an eminent authority says:

The powers of the King when acting in association with Parliament are unlimited. The King in Parliament is the sovereign power in the State. It is for this reason that there is no law which the King in Parliament cannot make or unmake, whether relating to the constitution itself or otherwise. . . .

In practice, however, the King now plays a purely formal part in the making of statutes, for, by convention, he has lost

²¹ 12 and 13 Will. III, c. 2.

the power of refusing his assent to a bill passed by both Houses, or in terms of the Parliament Act, 1911,²² by the House of Commons alone.²³

Constitution of the United States

Except for certain clauses of the preamble, there was very little expression of political philosophy in the Constitution of the United States as adopted by the Federal Convention in 1787 and presented to the various States for ratification. Yet not only the republican form of government established by the Constitution, but several of its provisions, imply a general acceptance of eighteenth-century liberalism. There can be little doubt that the political philosophy which had been expressed in the introductory sentences of the Declaration of Independence eleven years earlier, and in other public instruments,²⁴ had a definite influence upon the Convention, although a very strong element of conservatism also made itself felt.²⁵ Since the British strain in the colonies was so important in both size and influence, the traditional, customary, and statutory rights of free citizens which had been developed and fixed under the English Constitution, were certainly regarded almost *in toto* as belonging to the people of the various new States. If it were necessary to add logic to this customary viewpoint, there were plenty of individuals ready to uphold the "natural rights" doctrines that were so popular in the latter part of the eighteenth century.

The short term of office given to the President, the election of the House of Representatives by popular vote, trial by jury,

²² 1 and 2 Geo. V, c. 13.

²³ *Halsbury's Laws of England* (London, 1932), 2d ed., Vol. VI, p. 383. For a discussion of the nature of the British Constitution see N. L. Hill and H. W. Stoke, *The Background of European Governments* (New York, 1935), Ch. I.

²⁴ See "An Ordinance for the Government of the Territory of the United States West of the River Ohio" (July 13, 1787), particularly Secs. 13 and 14, Arts. I-III, VI. This is reprinted in C. C. Tansill, *Documents Illustrative of the Formation of the Union of the American States* (Washington, D. C., 1927), pp. 47-54.

²⁵ The discussions of the Constitutional Convention, published in various editions of *Madison's Debates*, show an interesting mixture of conservatism with republican liberalism. As one instance, read the debate of Wednesday, August 8, 1787 (Tansill, *op. cit.*, pp. 491ff).

and the independence of the judiciary (particularly the provision that judges shall hold office during good behavior), are institutional expressions of a philosophy which, if not wholly democratic, at least recognized a certain power in the people and certain definite duties on the part of the government. Such clauses as the prohibitions against granting titles of nobility, and against the acceptance of foreign titles and offices by persons holding offices of profit or trust under the United States, are obviously the fruit of a republican and liberal philosophy.

The original Constitution, nevertheless, failed to satisfy those by whom such a philosophy was valued most. Several of the States, in ratifying the Constitution, suggested definite amendments. So general was the demand for changes, that the first Congress which met under the new form of government proposed twelve amendments, ten of which were ratified by enough States to bring about their incorporation into the Constitution. These first ten amendments are commonly called the Bill of Rights of the United States. Some of them are almost identical with the rights of British subjects. Others—notably the First, in the clause which forbids the establishment of religion, and the Tenth, which reserves to the States “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States”—are different because of either sentiment or circumstance. The philosophy which underlay several later Amendments, especially the Thirteenth, Fourteenth, Fifteenth, and Nineteenth, was the conviction that all human beings of adult age and sound mind should be free, and should participate as equally as possible in the duties, responsibilities, rights, and privileges of citizenship.

Constitution of Italy

The Constitution or fundamental law which was promulgated on March 4, 1848, by Charles Albert, King of Sardinia and Prince of Piedmont, is still in force, despite the fact that Fascist laws have altered it in various essential respects. The philosophy expressed in its provisions is that of a very mild liberalism, as liberalism was interpreted nearly a century ago. The following quotations will serve to show its general tone.

Art. 26. Individual liberty is guaranteed. No one shall be arrested or brought to trial except in the cases provided by law and in the forms which it prescribes.

Art. 28. The press shall be free, but the law may suppress abuses of this freedom. . . .

Art. 32. The right to assemble peaceably and without arms is recognized, subject, however, to the laws that may regulate its exercise in the interest of the public welfare.

This provision is not applicable to meetings in public places or places open to the public, which remain entirely subject to police laws.

Art. 72. The proceedings of courts in civil cases and the hearings in criminal cases shall be public, as provided by law.²⁶

²⁶ From H. L. McBain and Lindsay Rogers, *The New Constitutions of Europe* (Garden City, New York, 1922), pp. 550ff. For their sources see p. 551, footnote.

CHAPTER IV

BASIC TOTALITARIAN DOCTRINES

A. Totalitarian Doctrines

Each of the three totalitarian states which we are considering professes its own body of doctrine. Each would repudiate indignantly the assumption that it shares the professions of the others. If the disinterested student is to reach any conclusion regarding the existence or non-existence of common elements in totalitarian doctrines, he must first examine separately the principles officially professed by the governments of Russia, Italy, and Germany.

Marxian Doctrines in Russia ¹

The doctrinal basis of the Communist government in Russia can be traced to the ideas of Marx and Engels, as extended and modified by other leaders, notably Lenin and Stalin. These ideas, which have had a profound influence upon nearly all "left" groups and parties in every country in the world, are developed with great particularity in a vast literature. It is impossible to discuss them adequately in a few pages, even in the most cursory fashion; but a few of the principal theses will be stated.

The class struggle is basic in Marxian doctrine. This means that existing economic classes (hence, social classes) are each

¹ The "bible" of Communism is of course Karl Marx's *Das Kapital*. Of almost equal importance are the writings of Friedrich Engels. See especially his *The Origin of the Family, Private Property, and the State*. See also in this connection Sidney Hook, *Towards the Understanding of Karl Marx* (New York, 1933); A. D. Lindsay, *Karl Marx's Capital* (London, 1925); H. J. Laski, *Karl Marx* (London, 1922); S. H. M. Chang, *The Marxian Theory of the State* (Philadelphia, 1931); V. I. Lenin, *The State and Revolution* (New York, 1932). A translation of the Communist Manifesto of 1848 is contained in Spahr, *op. cit.*, pp. 335-352, and of part of Lenin's *The State and Revolution*, *ibid.*, pp. 410-429. See also Hill and Stoke, *op. cit.*, Ch. XXIII.

other's natural enemies. This is because the owner of capital and employer of workmen must exploit his employees in order to make a profit. A consciousness of exploitation on the part of the workers will lead to the intensification of the class struggle which must eventuate in revolution and the victory of the more numerous class, the proletariat.

The labor theory of value helps to explain the inevitability of class warfare. The laborer takes raw materials and works on them, increasing their value, let us say by twenty marks in ten hours. But he is paid only ten marks and the remainder, although due exclusively to the laborer's efforts, is retained by the capitalist as rent, interest, and profit. This injustice is at the root of the class war.

The materialistic interpretation of history means that the general character of social life and institutions depends upon the economic structure of society. "In every society that has appeared in history, the manner in which wealth is distributed and society divided into classes or orders is dependent upon what is produced, how it is produced, and how the products are exchanged. From this point of view the final causes of all social changes and political revolutions are to be sought, not in men's brains, not in men's better insight into eternal truth and justice, but in changes in the modes of production and exchange. They are to be sought, not in the *philosophy*, but in the *economics* of each particular epoch."² This explains, in part, the predominant interest in the economic life which is so notable a feature of the U.S.S.R. The economic structure is expected not only to raise the general standard of living and enable Russia to defend herself indefinitely in war, but also to form the basis of an improved society.

A proletariat, or a class of exploited workers, living upon subsistence wages, is necessarily developed under the system of private capital, which thus sows the seeds of its own destruction. For the industrial proletariat will become class-conscious, and will form the vanguard of the social revolution. The rural peasant proletariat will follow the leadership given

²F. Engels. *Socialism, Utopian and Scientific*, translated by Edward Aveling (Chicago, 1913), p. 94.

them by their fellow workers of the cities. The bourgeois class (an expression used broadly to denote persons who are not proletarian in occupation or interests) must be dispossessed of property and power, which will thenceforward belong to the proletariat.

The State is conceived, not as an instrument for the preservation of law and order, so much as for the preservation of the dominating class which uses it for its own ends. It is the result of the class war which makes political power and institutions a necessity. "... it is a product of society at a certain stage of development; it is the admission that this society has become entangled in an insoluble contradiction with itself, that it is cleft into irreconcilable antagonisms which it is powerless to dispel. But in order that these antagonisms, classes with conflicting economic interest, may not consume themselves and society in sterile struggle, a power apparently standing above society becomes necessary, whose purpose it is to moderate the conflict and keep it within the bounds of 'order'; and this power arising out of society, but placing itself above it, and increasingly separating itself from it, is the state."³ The state therefore must be overthrown by the proletariat, but not destroyed at once. The workers' state, "the dictatorship of the proletariat," must be established until the classless society has been achieved. When there are no more classes, neither bourgeois nor proletariat, the coercive functions characteristic of the state will disappear. Indeed, the state, as defined above, will have withered away.

The nation as an exclusive group with a feeling of unity as against other nations, is another device of the exploiting class to deceive the proletariat as to the nature of its real interests. National lines must be disregarded by an enlightened proletariat, who must see in the occasion of capitalist-nationalist wars an opportunity to launch a proletarian revolution.

The time is ripe for the proletarian revolution when capitalism is mature; but it does not follow that capitalism will first be destroyed in a country . . . "where industry is most perfected, where the proletariat forms the majority, where civili-

³ Lenin, *op. cit.*, p. 8, quoting Engels.

zation is most advanced, where democracy is most developed." On the contrary, the revolution may most easily occur in a country where the government is most oppressive, most out of touch with popular feeling, and where the proletariat is most severely exploited. This explains why Russia was the scene of the first great proletarian revolution.⁴

A party must be formed in every country, to direct the proletarian revolution and consolidate its gains. Such a party must be disciplined, free from division and factions, and completely devoted to its revolutionary object. It should be observed that the world-revolutionary aspect of Communism has in recent years been less emphasized by the government of the U.S.S.R. This would seem to be due to the necessity felt by Russia to accommodate itself to a world of nation-states. The success of the Russian attempt to build a socialist state at home is conditional upon traffic with the rest of the world and upon general friendly and peaceful relations with other states. Therefore the Communist International, the world revolutionary organization, although it has conferences at Moscow under government patronage, is disavowed by the government of the U.S.S.R., which insists that the International is a private organization. It may also be true that the Russian government finds it desirable to build up a feeling of Russian nationalism in order the more easily to secure obedience and cooperation from its citizens. Marxian Communist doctrine, however, remains firmly wedded to the idea of world revolution and the necessity of destroying nationalism and non-socialist governments, and it may be that the apparent defection of the Russian government is a temporary expedient dictated by the necessities of international politics.

In Russia the state must persist in the form of a proletarian dictatorship so long as there is danger of counter-revolution from within or aggression from without. This dictatorship takes the form of a dictatorship of the Communist Party (Bolsheviks) which is the only political party permitted by law. Rigid discipline and adherence to the party "line" is demanded

⁴J. Stalin, *Leninism*, translated by Eden and Cedar Paul (New York and London, 1928-1933), 2 Vols.

of party members. Those expressing ideological deviations, either "right" or "left," are expelled. The party dictatorship is necessary in order to consolidate the revolution and ensure its permanence. After the complete achievement of Socialism it will wither away together with the state, as the latter is defined in Communist theory.⁵

The application of these doctrines in U.S.S.R. has led to the formation of a totalitarian state, that is, a state which controls all aspects of social life and all institutions. Freedom of association is transmuted in the new Constitution⁶ to "the right to unite in public organizations—trade unions, cooperative associations, youth organizations, sport and defense organizations, cultural, technical and scientific societies." The single word "public" at once denies any real freedom of association, and defines and establishes totalitarianism in one of its most important strongholds.

The leadership of the state in U.S.S.R. is different from the leadership in Italy and Germany, since it is given to a group of persons instead of to one man. This group is the Presidium or executive committee of the central legislature. However, there is no possible question that the influence of Stalin, Secretary-General of the Communist Party and dominant figure in its important Political Bureau, is almost that of a personal dictator.

The party support on which every totalitarian government depends is supplied in U.S.S.R. by the Communist Party. This powerful organization is recognized in the Constitution as "the vanguard of the toilers in their struggle to strengthen and develop the socialist system," which represents "the leading nucleus of all organizations of the toilers." Membership in the party, which, as in other totalitarian states, may not be opposed by other partisan organizations, is a privilege⁷ reserved

⁵ A criticism of the party dictatorship from a Marxian point of view is contained in Sidney Hook, "The Democratic and Dictatorial Aspects of Communism," *International Conciliation* (December, 1934), No. 305, pp. 458-462. A brief account of Communist theory is contained in *International Conciliation* (December, 1934), No. 305, pp. 452-458. On Communism and world revolution see Hill and Stoke, *op. cit.*, pp. 525-535; Leon Trotsky, *The Revolution Betrayed*, translated by Max Eastman (New York, 1937), and Eugene Lyons, *Assignment in Utopia* (New York, 1937).

⁶ Art. 126.

⁷ *Ibid.*

for "the most active and politically conscious citizens from among the working class and other strata of the toilers."

Democratic institutions are copied to a certain extent at least in their external forms. Universal suffrage, the direct popular election of legislators and judges, the secret ballot, and a bill of rights, all bear the outward forms of democracy. The limitations of totalitarianism, however, and the predominating influence of the Communist Party make real personal freedom and real political democracy impossible.

Fascism in Italy⁸

The doctrines of Fascism are much less systematic than those of Communism. They are rationalizations of revolution rather than descriptions of a plan of government. Mussolini himself writes that he had "no specific doctrinal attitude" in mind as late as March, 1919.⁹ As he says, he was familiar at that time only with Socialist doctrines, and these have had an influence upon Fascist attitude toward economic matters. But above all, Fascism prides itself upon its practicality. Its motto is: "Deeds, not words." Even inconsistencies between policy and action or sudden changes in policy are explained as evidence of a healthy "dynamism" and "relativism."

Thinkers whose influence may be traced in Fascist theory include Nietzsche, with his doctrine of the superman and the dangerous life; Sorel, with his admiration of "surgical violence"; Machiavelli, whose precepts have been followed with noteworthy success; and perhaps Pareto, with his emphasis upon sentiments rather than interests as springs of action and his doctrine of government by an élite.

A brief summary of Fascist principles may be given here.¹⁰

Fascism repudiates pacifism and finds much to admire in war, for "War alone brings up to its highest tension all human

⁸ Fascist theory is fully described and critically examined in H. A. Finer, *Mussolini's Italy* (New York, 1935), Pt. III, Chs. VI, VII. See also Alfredo Rocco, "The Political Doctrine of Fascism," *International Conciliation* (October, 1926), No. 223, pp. 393-415; Benito Mussolini, "The Political and Social Doctrine of Fascism," *International Conciliation* (January, 1935), No. 306, pp. 3-25.

⁹ Mussolini, "The Political and Social Doctrine of Fascism," *loc. cit.*, p. 5.

¹⁰ *Ibid.*, also Benito Mussolini, *Fascism* (Rome, 1935), pp. 15ff.

energy and puts the stamp of nobility upon the peoples who have the courage to meet it." Courage, the fighting spirit, a joyful acceptance of life and its problems are characteristic of the true Fascist.

Men must be essentially masculine and women as thoroughly feminine. The latter must devote themselves to their peculiar functions, home-making and child-bearing. In other words, a large population is desired and encouraged because large armies will be needed in case of an important war.

Fascism is essentially national. International organizations, such as the League of Nations, are acceptable only as they may be expedient in solving a specific problem in international relations. "Love one's neighbor" is a motto to be applied only within the national boundaries. "Fascism repudiates any universal embrace. . . ." Foreign policy must be based upon the single idea of promoting the interests of the national state.

The Marxian materialistic conception of history is repudiated, as are the class war and the aim of Socialism, happiness through well-being, "which would reduce men to the level of animals . . . and . . . degrade humanity to a purely physical existence."¹¹ The Marxian picture of the state as an instrument of class domination is replaced by an idealistic or mystical view of the state as a historical entity. The class struggle will become unnecessary and indeed impossible when the state controls economic relationships. This view, rightly understood, is the antithesis of the Marxian philosophy.

Not only Socialism but also democratic ideology is rejected, with its insistence upon the tie of equality. Democracy is always a sham; but if it be defined as "a state of society in which the populace are not reduced to impotence in the State—Fascism may write itself down as 'an organized, centralized, and authoritative democracy.'"

Liberalism, political and economic, is rejected as the prelude to anarchy.

Fascism opposes the laissez-faire economy of historical liberalism as sharply as it opposes a Socialist economy. In politics

¹¹ It is hardly necessary to note that this is a distortion of Socialist doctrine.

it discards the democratic view that the will of the majority should become the will of the state, and insists upon the reverse of this principle—that the will of the state, as discovered and expressed by the “élite,” or the wisest and best citizens, must be accepted by the individual and must thus become the will of every worthy citizen.

“Fascism conceives of the State as an absolute, in comparison with which all individuals or groups are relative, only to be conceived of in their relation to the State. . . . The Fascist State is itself conscious, and has itself a will and a personality. . . .” The state is “. . . a spiritual and moral fact in itself . . . a manifestation of the spirit . . . the custodian and transmitter of the spirit of the people.”

“The Fascist State organizes the nation, but leaves a sufficient margin of liberty to the individual; the latter is deprived of all useless and possibly harmful freedom, but retains what is essential; the deciding power in this question cannot be the individual, but the State alone.” This disposes of the liberal doctrine of fundamental personal liberties. “The Fascists do not agree . . . that a nation belongs to the people who inhabit it at any given moment. The living generation, according to the Fascist doctrine, merely holds it as a heritage and a trust. The best interests of the State may, therefore, be different from those of the people who compose it at any given time. For society and the State overlap the existence of the individual, and must do so if they are to serve their professed ends.”¹²

Religion is respected and defended by the state. The state has “no theology, but a morality.”

Imperialism is a natural expression of vitality. But the imperialism of the Fascist state “is not only territorial, or military, or commercial; it is also spiritual and ethical.”¹³

The mystical character of the above doctrines is evident. Feeling and intuition are elevated above reason—but, of course, only the feeling and intuition of the Fascist leader. The state

¹² W. B. Munro, *The Governments of Europe* (New York, 1931), footnote, p. 693.

¹³ Mussolini, *Fascism*, pp. 10 ff.

is really left undefined in human terms, but is set up as an "absolute." This is a useful myth to a leader who could say with more accuracy than Louis XIV, "L'état, c'est moi." The vagueness of Fascist doctrine combined with strong, even crude and picturesque language is intended to give a picture of a leader who is himself strong and simple, who leads with his heart rather than his head, and whose heart is always right! The world is full of Communist criminals and Liberal milk-sops. Only the shining heroes of Fascism can save the day by taking over the state! The realities of Fascism cannot possibly be understood by an examination of the above doctrines. It is necessary to examine the actual machinery of government and its operation.

National Socialism in Germany¹⁴

Like Italian Fascism, German Naziism has, in the words of Professor Schuman, "always been less a doctrine than a faith." Intuition and feeling count for more than cold reason. The vague doctrine and hysterical language of Hitler's autobiography is echoed in many other party writings and speeches. Nevertheless the party, or rather its immediate predecessor, the German Workers' Party, did adopt an official program on February 25, 1920. Its twenty-five points reflect a doctrinal basis of (1) intense and narrowly defined nationalism, (2) a middle-class "radicalism" wholly antagonistic to Marxism, and (3) insistence upon a strong central government.

In 1926 the Council of the party authorized the publication of expository pamphlets. In one of the most important of these,¹⁵ Nazi doctrine is set forth in a series of propositions, with supporting arguments. The principal propositions contained therein may be summarized as follows:

¹⁴ For accounts of National Socialist theories see Hill and Stoke, *op. cit.*, pp. 397-407, including the official party programme; Gottfried Feder, *Der Deutsche Staat* (Munich, 1923), the "catechism" of the party; Adolf Hitler, *My Battle*, an abridged translation of *Mein Kampf* by E. T. S. Dugdale (Boston and New York, 1933); H. D. Lasswell, "The Psychology of Hitlerism," *Political Quarterly* (July-September, 1933), Vol. IV, pp. 373-384; F. L. Schuman, "The Political Theory of German Fascism," *American Political Science Review* (April, 1934), Vol. XXVIII, No. 2, pp. 210-232.

¹⁵ Gottfried Feder, *Hitler's Official Programme and Its Fundamental Ideas* (London, 1934).

The German state should be a "closed national state, embracing all branches of the German race." This at the same time excludes Jews and others within Germany, while it claims to include all those of German blood within other states, such as the Germans in Czechoslovakia, the Baltic Germans, the Ukrainian Germans and even the German Swiss.

Non-Germans, especially Jews, are to be excluded from holding responsible public offices; and if "undesirable," such persons should be deported. Immigration of "Eastern Jews and other parasitic aliens . . . must be stopped." "Racial hygiene" is to be fostered, which means the prohibition of Jewish-German marriages, sterilization of insane and feeble-minded persons; and "the lofty aim, the supreme aim, the Nordicizing of our people in the spirit of the German ideal, must be promoted." Citizenship with full rights is the privilege of Germans only, who believe in the national "Kultur" and in the great destiny of the Germanic people. Non-Germans may remain only as "guests."¹⁶

The political value of the above myths is obvious. They intensify German national feeling, give Germans a gratifying superiority feeling with a consequent admiration for the sponsors of the myths, and also provide a helpless victim for the discharge of accumulated resentments and frustrations.

Anti-Semitism was an especially necessary doctrine for the Nazis because it enabled them to enroll the lower middle class and unemployed, and at the same time receive help from big business, by stressing the fact that "patriotic" and "German" enterprise was no national menace, but that Jewish international finance on the one hand and Jewish Communism at the

¹⁶ The myth of "Aryan" superiority is the product of nationalistic pseudo-anthropology and springs from a Frenchman, Arthur de Gobineau, and an Englishman, Houston Stewart Chamberlain, both writing in the nineteenth century. The "Aryan" (or in some forms, the "Nordic") myth became naturally a corollary of anti-Semitism, a much more ancient doctrine. Modern anti-Semitism in Germany seems to be the product chiefly of lower middle class exasperation against the claims of organized labor on the one hand and the fierce competition of big business on the other. Jews were prominent in banking and mercantile enterprises and the old anti-Semitism flared up, giving the Nazis a convenient scape-goat for all national ills. The Jews were blamed for Germany's defeat in the war, Communism, nudism, etc., etc. See Schuman, "The Political Theory of German Fascism," *loc. cit.*, pp. 212-219.

opposite extreme were both the agencies of a Jewish plot for world domination. Hitler and his colleagues were able to persuade their followers that everything they hated, from Communism to the League of Nations, was part of this universal Jewish conspiracy. "The integration of these divergent negative responses into a general assault upon the Weimar Republic, following their ideological unification through anti-semitism, is the most brilliant psychological achievement of Nazi propaganda."¹⁷

Feder's "catechism" agrees with the Italian view of woman's proper sphere. Although a citizen, she must remain at home, look after her household and bear children for the Fatherland, thus leaving positions open to be filled by men, and strengthening the man-power of the Reich.

In the economic realm, the national government must act: (1) to provide the necessities of life rather than to secure to capital the highest possible returns; (2) to protect private property; (3) to set a limit upon the wealth of individuals; (4) to encourage all Germans to work; (5) to foster a healthy combination of concerns of all sizes, in all departments of economic life, including farming; (6) to nationalize big business; (7) to punish with death "usury and profiteering, and ruthless self-enrichment at the expense of the nation"; and (8) to introduce an obligatory year of labor or service for every German.

Most important of all in Feder's creed, the "thralldom of interest" must be abolished. The state must cease paying interest to great private financial firms. The Reichsbank and all banks of issue must be nationalized. Old-age and disability insurance must be nationalized. Profit-sharing for all is advocated, as is the expropriation by the state of profit made by war and revolution or the revaluation of the Reichsmark. These ideas are already less radical than those of the original 1920 program.

The socialist aspect of National Socialism is not very clear or consistent, as the above passages indicate. Feder's prime reform, the abolition of interest, has been dropped and Feder himself relegated to obscurity. Why did this party claim to be

¹⁷ Schuman, "The Political Theory of German Fascism," *loc. cit.*, p. 215.

Socialist if in reality it is nothing of the kind? The answer is to be found partly in the fact that the word-symbol "Socialist" is attractive to the German masses and was useful in gaining adherents,¹⁸ partly in a genuine enthusiasm on the part of Hitler for Feder's economics. The Nazis have indeed dropped most of the Feder program, but this does not mean that there is no regimentation of business in Germany. On the contrary, it is severely regulated in every detail, but the regulations are of a character to restrain unemployment and mobilize the economic machine for war, rather than to destroy the private capitalistic system. The principal economic changes introduced by the Nazis have been the destruction of the free labor unions and the regimentation of agriculture.

Nowhere in the above original Nazi demands do we find any doctrine of the state. Marxism is attacked and strong government demanded, but the subsequent dictatorship could not have been foretold merely from the party program. It is true that the military uniforms of the Storm Troopers, the discipline, the salutes, and so on suggested a hierarchy of authority pointing up to a supreme command. It was only subsequently, that is, after Hitler had embarked upon his long struggle for power, that we find the doctrines of the totalitarian state and the "leadership-principle" propounded by party adherents. Hitler himself in his autobiography (1925) had clearly denounced liberalism and democracy and suggested the choice in free election of a leader who would thereupon assume dictatorial power. He had already introduced military discipline and unquestioning obedience into the party machine, and once in power, he did the same thing for the entire nation. The closest analogy for the Nazi state is an army of the Prussian type—an analogy used by *der Führer* himself. Party discipline has been imposed upon the nation just as the party symbol, the swastika, has been made an integral part of the national flag. The N.S.D.A.P. (National Socialist German Workers' Party) is, of course, the only party permitted to exist, and is defined by law as "the

¹⁸ The first Nazi posters always appeared with red backgrounds, for similar reasons. A like situation regarding word-symbols exists in France where a conservative "centre" party finds it desirable to be known as "Radicals of the Left."

carrier of the German government," and as "inseparably connected with the state."

The leadership-principle is defined as the concentration of all power in the hands of the leader of the national élite. Power radiates from the top downward and responsibility is from the bottom up. The dictator is declared to be responsible to God and to the people. The latter responsibility remains as undefined as the former, but plebiscites taken at strategic moments and by a fool-proof system have enabled Hitler to claim an all but unanimous support of the masses.

Again, as in the case of Italy, we find ourselves confronting a formless mysticism rather than a coherent political theory, and again we must conclude that a study of the institutions of the state in their actual operation is necessary to any understanding of National Socialism.

Conclusions

The democratic states which we are considering possess a homogeneous body of doctrine, differing only in detail from country to country. Can the same be said for the three sets of totalitarian ideas briefly presented above? Certainly the avowed objectives of the three states are not the same. The U.S.S.R. disavows nationalism and strives to establish Socialism at home. It disclaims revolutionary activities abroad and in international affairs plays a rôle strikingly like that of the great democracies, because, indeed, it requires peace for its domestic program, and does not suffer from land-hunger. At the same time the orthodox Communist doctrine of the dominant party calls for eventual world revolution, to produce classless states which will merge into a stateless society. Italy and Germany seem to have more in common. Both violently nationalistic, they seek colonies and power among the nations. Differences in their foreign policies are not due to ideology but to their separate requirements.

There are striking similarities between all three in some respects. All have established by means of violence a dictatorial, one-party regime. The chief executive in each case (but not legally in Russia) is a dictator. His responsibility, if any,

is to the party he dominates. The ruling party in each case consists of a disciplined group intolerant of the slightest heresy, and is the only "party" permitted to exist. All are totalitarian states, which means that no department of life nor any activity is deemed untouchable by government. Liberties exist only because the government does not choose to remove them. All three states attempt to fire their citizens with crusading zeal in order to attain a military discipline among them for the pursuit of the alleged destiny of the group. All claim to be the result of mass action and the leadership of an élite. All claim to be essentially "democratic" in the broad sense of resting upon a general public support. The truth of this claim is undiscoverable because in all three the government commands sufficient force and is sufficiently ruthless to suppress any opposition that dares to appear.

The differences between Italian and German doctrine are unimportant. Anti-Semitism was a political necessity in Germany and could be linked advantageously with anti-Communism. In Italy it could not, so the Fascists had to pose not as the saviors of a race but simply as the saviors of the nation from the red menace. It is not true, however, that Nazism was a slavish copy of Fascism, although the use of uniforms, standards, heraldic symbols, and the like may have been so inspired. The movements owe their likeness more to a similarity of causes: a weak, or seemingly weak, democratic representative government with a multitude of parties; a frightened and distressed lower middle class; a communist alarm; a feeling of injustice and frustration as a result of the war, and so on.

Russia has less in common with the two western states than they have with each other. The distinction is further emphasized by the new Constitution, which superficially establishes a direct representative democracy, although it provides for existence of only one political "party" and contains no indication that the dictatorship is abdicating. The removal of class distinctions for the franchise would seem to indicate that the Bolshevik regime now feels that it can safely depend upon popular support. However, the long series of political trials, so puzzling to observers, are evidence that all is not well within

the party and that the dictatorship continues to be ruthless.¹⁹ It has been charged that the new Constitution marks no real change in Russian politics and is merely a screen raised by the dictatorship to help secure the good will of the great democracies whose support is needed in foreign affairs. Only subsequent events will determine the truth or falsity of this assumption.²⁰

B. Appendix to Totalitarian Doctrines

The following extracts from the various Constitutions of the three totalitarian states are chosen to show the basic philosophy underlying each.

Constitution of the U.S.S.R.²¹

This Constitution was ratified by the All-Union Congress of Soviets, December 5, 1936.

- Art. 1. The Union of Soviet Socialist Republics is a socialist State of workers and peasants.
- Art. 2. The political basis of the U.S.S.R. is formed by the Councils (Soviets) of toilers' deputies, which have developed and become strong as a result of the overthrow of the power of the landlords and capitalists and the winning of the dictatorship of the proletariat.
- Art. 3. All power in the U.S.S.R. belongs to the toilers of city and village as represented by the councils (Soviets) of toilers' deputies.
- Art. 4. The economic basis of the U.S.S.R. is formed by the socialist system of economy and the socialist ownership of implements and means of production, which have

¹⁹ See signed article by Leon Trotsky in *New York World-Telegram*, February 1, 1937; and Max Schachtman, *Behind the Moscow Trial* (New York, 1936), a Trotskyist pamphlet. See also "Behind the Soviet Trials," *The Nation* (February 6, 1937), Vol. CXLIV, No. 6, pp. 143-144, and Trotsky, *The Revolution Betrayed*.

²⁰ For a very optimistic account of the new Constitution see Sidney Webb, "Soviet Russia's New Deal," *The Nation* (November 21, 1936), Vol. CXLIII, No. 21, pp. 596-598.

²¹ The translation followed here is that of Professor Clarence A. Manning of Columbia University as presented in *International Conciliation* (February, 1937), No. 327, pp. 143-163.

been firmly established as a result of the liquidation of the capitalist system of economy, and abolition of private ownership of implements and means of production, and the destruction of the exploitation of man by man.

Art. 6. The land, its deposits, waters, forests, mills, factories . . . banks, means of communication, large agricultural undertakings organized by the State . . . are State property, that is the property of the whole people.

Art. 9. Along with the socialist system of economy, which is the prevailing form . . . in the U.S.S.R., there is permitted by law small private economy of individual peasants and handicraftsmen, based on their personal labor and excluding the exploitation of the labor of another person.

A mild exception is made in Socialism here. There is a rather more important exception in connection with collective farms, which are guaranteed perpetual free possession of their individual land. (Article 8.)

Art. 12. Toil in the U.S.S.R. is an obligation and a matter of honor of each citizen who is fit for toil, according to the principle: "He who does not work, does not eat."

In the U.S.S.R. there is being realized the principle of socialism: "From each according to his ability, to each according to his toil."

Note that this is not the original Socialist slogan which concluded: "To each according to his need." The change is consistent with current policy in Russia, which includes wide differences in wages and salaries.

Chapter II of the Constitution continues the existing federal arrangement, with the scales weighted so heavily in favor of the central government of the U.S.S.R. that the federalism is seen to depend entirely upon the degree of freedom granted the member-states by the central authority. Examples of centrally reserved powers make this clear. To the U.S.S.R. belong:

Art. 14. (a) the representation of the union in international relations, the conclusion and ratification of treaties . . .;

- (b) questions of war and peace;
- (c) the acceptance of new republics into the . . . U.S.S.R.;
- (d) control over the observance of the Constitution of the U.S.S.R. and the ensurance of conformity of the Constitutions of the Union Republics with the Constitution of the U.S.S.R.; . . .
- (g) the organization of the defense of the U.S.S.R. and also the direction of all the armed forces of the U.S.S.R.; . . .
- (j) the establishment of plans of national economy . . .;
- (k) the approval of a single State budget of the U.S.S.R., and also of the taxes and revenues, which serve to form the budgets of the Union, republics, and localities; . . .
- (r) the establishment of basic principles in . . . education and the public health; . . .
- (u) legislation on the judicial structure and . . . procedure; criminal and civil codes; . . .

The Union Republics enjoy residual powers, but as the above partial list indicates, this is a highly centralized federation. By Article 17 the Republics are still given the right to withdraw from the U.S.S.R. but this is hardly to be taken seriously.

Art. 30. The highest organ of State power of the U.S.S.R. is the Supreme Council (Soviet) of the U.S.S.R.

This replaces the All-Union Congress of Soviets. Like its predecessor, it is bicameral, the second Chamber being the Soviet of Nationalities. The first Chamber (Soviet of the Union) consists of representatives directly elected by all citizens on a basis of one member per 300,000 of the population. The Soviet of Nationalities reflects the federal side of the system, and each Republic, according to its classification, is equally represented therein. The term in both Houses is four years, and the sessions are semi-annual, with provision for special sessions if demanded by the Presidium of the Supreme

Soviet or by a Union Republic. Provision is made for a dissolution and election if the two Chambers fail to agree. (Articles 30-47.)

The Supreme Soviet of the U.S.S.R. chooses, at a joint session, the Presidium, a body of 37 members. This body convenes the Supreme Soviet; interprets laws and issues decrees; reviews the decisions and orders of the Soviet of People's Commissars of both the U.S.S.R. and the Union Republics, as to their legality; and in general acts as the legislature between sessions, as well as enjoying considerable executive powers. (Articles 48 and 49.)

The Supreme Soviet also chooses in joint session the "government of the U.S.S.R.—the Council (Soviet) of People's Commissars of the U.S.S.R." (Article 56.) This is the "highest executive and administrative organ of the State power . . ." and is declared to be responsible to the Supreme Soviet and between sessions to its Presidium. (Article 65.) The Commissars are either All-Union, or Union Republic. The former operate directly throughout the entire Union and the latter only in part directly, but chiefly through Union Republic Commissariats.

Art. 77. To the All-Union People's Commissariats belong the People's Commissariats of:

Defense;	Communications;
Foreign Affairs;	Water Transport;
Foreign Trade;	Heavy Industry;
Railways;	Defense Industry;

The Constitution sets up a virtually identical system of government for the Union Republics and Autonomous Republics. The system throughout is little changed from that previously in force, except for the introduction of directly elected legislatures.

There is provided a judicial hierarchy, the judges being appointed for a term of five years by the appropriate Republic or Union Supreme Soviet, except for the lowest (People's) courts which are elected in each rayon for a term of three years. (Articles 102-109.)

The State Attorney of the U.S.S.R. actually controls all prosecutions, for he is in direct charge of all subordinate State Attorneys and appoints them or approves their appointment. He is elected by the Supreme Soviet of the U.S.S.R. for a term of seven years. (Articles 114-117.)

Chapter X of the Constitution (Articles 118-133) describes "The Fundamental Rights and Obligations of Citizens." This is very interesting, both for its additions to the usual democratic Bill of Rights and for a few significant omissions.

Art. 118. Citizens of the U.S.S.R. have the right to toil, that is the right to receive guaranteed work with payment for their toil in accordance with its quantity and quality.

This is a new departure for a Bill of Rights and one which emphasizes the socialist economy of the U.S.S.R. It makes no allowance for "normal unemployment." Workers are also guaranteed "the right to rest" (Article 119) and "the right to material security in old age—and also—in case of illness and loss of capacity to toil." (Article 120.) Free education is guaranteed (Article 121) and equal rights for women (Article 122). Complete national and race equality is guaranteed (Article 123) as is freedom of conscience and religion. This is a change from early days, but the article also guarantees "freedom of anti-religious propaganda" which if sufficiently active might in fact interfere with the freedom of worship.

Art. 125. In accordance with the interests of the toilers and in the object of strengthening the socialist system, the citizens of the U.S.S.R. are guaranteed by law:

- (a) freedom of speech,
- (b) freedom of the press,
- (c) freedom of assemblies and meetings,
- (d) freedom of street processions and demonstrations.

These rights of citizens are secured by placing at the disposal of toilers and their organizations printing presses, supplies of papers, public buildings, streets, means of communications, and other material conditions necessary for their exercise.

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These rights of citizens are secured by placing at the disposal of toilers and their organizations printing presses, supplies of papers, public buildings, streets, means of communications, and other material conditions necessary for their exercise.

Does this mean *real* freedom of speech, press, and assembly? One may suppose not, if the freedom were used in a way unpalatable to the Communist Party. Article 126 ensures the right of citizens to form organizations and societies, but there is no mention of political parties other than the Communist which is declared to represent "the directing kernel of all organizations of toilers, both public and State." This may perhaps be taken as a warning to those who would naïvely assume that Article 126 permitted the formation of non-Communist political parties.

Articles 127 and 128 declare that there may be no arbitrary arrest and that "inviolability of residence . . . and the secrecy of correspondence are protected by law." Arrest is only "on the decision of the court or with the sanction of the State Attorney." As pointed out in Chapter I of this book, this does not give the Anglo-American protection of habeas corpus, that is, it does not prevent arbitrary arrest by the state authorities and the holding of persons without trial for indefinite periods. One would have to be familiar with the precise nature of the law mentioned in Article 128 and its administration to know the value of the guarantees of that article.

Chapter XI of the Constitution sets up the usual provisions for a representative democracy—universal, equal and direct elections and the secret ballot. Nominations may be made by "public organizations and societies of toilers, Communist Party organizations, professional unions, cooperatives, organizations of youth, cultural societies." (Article 141.) Recall is provided by Article 142. Does this permit a real non-Communist representation? Again one can hardly suppose that the party is abdicating the control it actually exercises over these various organizations whether officially connected with the party or not. It will be instructive to compare the representation of the Communist Party in the new Supreme Soviet with that it enjoyed in the old All-Union Congress of Soviets and, still more important, the party strength in the Presidium and the Commissariats. Finally, Chapter XIII provides for the alteration of the Constitution by the Supreme Soviet of the U.S.S.R. The Chambers vote separately and a two-thirds majority in each is

required to pass the amendment. There is no provision for a referendum or for the election of a special Supreme Soviet on the question of the amendment, although this might be done at the instance of the Presidium.

Constitution of Italy

In theory the old Constitution of United Italy, the *Statuto*, remains the fundamental law. Without discarding it completely, the Fascist dictatorship has introduced changes of such importance as to create a completely new governmental system. Almost the only remaining portion of the original system is the provision in Articles 1 and 2 of the law of December 25, 1925, which retains the Cabinet system under the King. The discretionary power formerly possessed by the King has, of course, completely disappeared in practice.

The dictatorship is legally established by a series of laws.

Art. 2.²² The Head of the Government the Prime Minister Secretary of State is appointed and dismissed by the King and is responsible to the King for the general policy of the Government.

Note that there is no responsibility to Parliament. Responsibility to the King is derisory.

Art. 4. The number, the appointment, and the attributes of the Ministers are established by the Royal Decree, with the approval of the Head of the Government. . . .

Art. 6. No question can be placed on the agenda of either of the two Chambers without the consent of the Head of the Government.

Art. 3.²³ After consultation with the Council of Ministers, regulations with the form of law may be issued by Royal decree:

²² Law of December 25, 1925. Quoted in Hill and Stoke, *op. cit.*, pp. 469-470, from *European Political and Economic Survey* (Paris, 1925-1926), Vol. I, No. 9, pp. 10-11. For translation of Italian Fascist legislation see Hill and Stoke, *op. cit.*, pp. 469-487, M. H. Andrew, *Twelve Leading Constitutions* (Compton, California, 1931), pp. 157ff. and references in Finer, *Mussolini's Italy*, Ch. IX.

²³ Law of January 31, 1926. Quoted in Hill and Stoke, *op. cit.*, pp. 476-477, from *British and Foreign State Papers* (London, 1932), Vol. CXXVII, Pt. III, pp. 755-756.

- (1) When the Government is therefor authorized by law. . . .
- (2) In extraordinary cases in which reasons of urgent and absolute necessity require it. The decision on the necessity and urgency is subject to no other authority than the political authority of Parliament.

This extends further powers to the executive to legislate by decree-laws, a practice already used frequently by the pre-Fascist governments. Under the above article, provision is made for the expiration of the decree-laws within two years unless ratified by Parliament. Owing to the composition of that body this is no check upon the executive. Criticism of the executive is suppressible under the following law :

Art. 9.²⁴ Whoever by word or deed offends (offende) the Head of the government will be punished with confinement or detention ranging from six to thirty months and with a fine of from 500-3,000 lire.

The representative system was completely altered by a law of March, 1928. Nominations, under this law, are made by the national confederations of syndicates (workers' and employers' organizations). These bodies nominate 800 names for the 400 seats in the Chamber. A few chosen associations nominate 200 more. The Grand National Council of Fascism then picks out the desirable ones, adds as many as it sees fit, discards the rest and draws up the final list of 400.

Art. 6.²⁵ The vote shall be taken by means of ballot-papers bearing the stamp of the Fascist dictatorial emblem and the formula: "Do you approve the list of deputies nominated by the Grand National Council of Fascism?" The vote shall be expressed below the formula by "Yes" or "No."

Provision is made in Article 8 of this law for the procedure in case the first list is rejected but this is merely for the sake of legal completeness. The rejection of the list is "politically impossible."

²⁴ Law of December 25, 1925, quoted in Hill and Stoke, *op. cit.*, p. 471.

²⁵ Hill and Stoke, *op. cit.*, p. 480, quoting *European Economic and Political Survey* (Paris, 1927-1928), Vol. III, pp. 413-415.

The only possible check upon the dictatorial quality of the government might be found in the Fascist Grand Council which is not only the governing body of the Fascist "Party" but also the link between the Fascists and the government. It contains many ex-officio members, and also (by an Amendment of 1929) nominees of the Head of the Government who sit for three-year terms. But the complete domination of *il Duce* is carefully provided for here, as the following articles indicate:

Art. 2.²⁶ The chief of the Government . . . is of right President of the Fascist Grand Council. He summons the Council whenever he considers necessary and settles the agenda.

Art. 6. The membership in the Grand Council of all persons mentioned in the three preceding articles shall be recognized by Royal decree, on the proposal of the Chief of the Government. The recognition may be revoked by the same means at any time.

The Grand Council picks the list of deputies; decides the rules of the Fascist Party; appoints and dismisses the party officers; has the right to be consulted on all constitutional questions; finally, it nominates the successor to the Head of the Government. All of these functions belong to it by law.²⁷

In sum, the picture of Italian government presented by the above and other laws is one of an almost unrelieved despotism unencumbered by restrictions, "fundamental laws" or constitutional political theory. The electorate has no power of criticism. Censorship prevents discussion and Fascist propaganda is incessant. The Fascist élite is governed by the Grand Council which formerly nominated the Chamber of Deputies and will be a power in the Corporative State.²⁸ The Grand Council, in turn, is dominated by the Head of the Government, who also

²⁶ *Ibid.*, pp. 484-485, quoting *European Economic and Political Survey* (Paris, 1928-1929), Vol. IV, No. 8, pp. 231-232.

²⁷ See dispatch by A. Cortesi in the *New York Times*, February 17, 1937, p. 13, headed "Chiefs of Fascisti to Map Next Step." This forecasts the business to be discussed at the next Grand Council meeting called by Mussolini for March 1, including the proposed replacement of the Chamber of Deputies by a body to represent the Corporations. The prediction proved true.

²⁸ *Ibid.*

controls legislative business and may, by using Royal decrees, practically dispense with the legislature except that it serves as a "sounding-board" for his proposals.

Constitution of Germany

Hitler found himself, after the elections of March 5, 1933, in a position to alter the Weimar Constitution as much as suited his purpose. Article 76 of the Weimar Constitution permitted amendments by a two-thirds vote of a two-thirds quorum in the Reichstag and a two-thirds vote in the Reichsrat. Hitler, by excluding the Communists and having Nationalist support, was able to secure his Enabling Act by a vote of 441 to 94. Significant passages include the following:²⁹

Art. 1. National laws can be enacted by the Reich Cabinet. . . .

Art. 2. The Reich laws enacted by the Reich cabinet may deviate from the constitution in so far as they do not affect the position of the Reichstag and the Reichsrat.

. . .

Art. 4. Treaties of the Reich with foreign states which concern matters of national legislation do not require the consent of the bodies participating in legislation. The Reich cabinet is empowered to issue the necessary provisions for the execution of these treaties.

The laws which are accepted as fundamental in the "third Reich" have transformed the structure of the government without indulging in many expressions of political philosophy.³⁰ Yet the very provisions of the laws embody the philosophy or "world viewpoint" of National Socialism. Characteristic examples are the following.³¹

²⁹ Translations of the text of this Act are to be found in the *New York Times*, March 24, 1933, quoted in Hill and Stoke, *op. cit.*, pp. 412-413; also in J. K. Pollock and H. J. Heneman, *The Hitler Decrees* (Ann Arbor, 1934), and R. L. Buell and others, *New Governments in Europe* (New York, 1935), pp. 209, 210.

³⁰ An excellent summary of the philosophy of the *Führerstaat* is to be found in F. M. Marx, *Government in the Third Reich* (New York and London, 1936), Ch. II. A good account in German is O. Koellreutter, *Deutsches Verfassungsrecht* (Berlin, 1935).

³¹ Translations from Pollock and Heneman, *op. cit.*

The state legislatures are abolished.

The rights of the states are transferred to the Reich.³²

The office of the National President is united with that of the National Chancellor. In consequence, the former powers of the National President pass to the Leader and National Chancellor, Adolf Hitler. He appoints his deputy.³³

In order permanently to deprive communist endeavors of a traitorous nature of useful property, the National Cabinet has enacted the following law which is herewith promulgated:

I

(1) The highest state officials or the authorities designated by them, may confiscate for the benefit of the state, property and rights of the Communist Party of Germany and its auxiliary and subsidiary organizations, as well as property which is used or intended to be used for furthering Communist activities.³⁴

I

After the victory of the National Socialist revolution the National Socialist German Workers' Party has become the bearer of the German government and is inseparably connected with the state.

It is a corporation of public law. Its Constitution is determined by the leader (*der Führer*).

VI

Public authorities must, within their power, give assistance to Party and Storm Troop officials who are vested with Party and Storm Troop jurisdiction in rendering justice and legal redress.³⁵

Contributing by work, news report, or picture to the intellectual content of newspapers or political periodicals, pub-

³² Arts. I and II (1) of the Law for the Reconstruction of the Reich, January 30, 1934, *Reichs-Gesetzblatt*, 1934, No. 11, p. 75.

³³ Law concerning the Head of the German Reich, August 1, 1934, *Reichs-Gesetzblatt*, 1934, No. 89, p. 747. This law was submitted to a popular referendum on August 19, 1934.

³⁴ Law for the Confiscation of Communist Property, May 26, 1933, *Reichs-Gesetzblatt*, 1933, No. 55, p. 293.

³⁵ Law for Safeguarding the Unity of Party and State, December 1, 1933, *Reichs-Gesetzblatt*, 1933, No. 135, p. 1016.

lished within the German territory, is a public vocation which, concerning its professional duties and rights, is regulated by this law. The contributors are called editors. Nobody may call himself editor who is not, according to this law, entitled to do so.

V

No one may be an editor except one who:

1. Is a German citizen;
2. Has not lost his civic rights and the qualifications to hold public office;
3. Is of Aryan descent and not married to a person of non-Aryan descent;
4. Has reached the age of 21;
5. Is competent;
6. Has had professional training;
7. Has the qualifications required for the influencing of public opinion intellectually.³⁶

The examination of even these few excerpts from the legislation of the Nazi regime is sufficient to show the totalitarian and absolute character of the government set up by Hitler and his colleagues. The true federal character of the Republic was questioned by some authorities, as the component *Länder* could not legally prevent alterations in their boundaries by Reich action.³⁷ The new regime has completely destroyed even the questionable federalism preserved by the republic and substituted a unified state, governed by an unchecked executive.

³⁶ Press law of October 4, 1933, *Reichs-Gesetzblatt*, 1933, No. III, p. 713.

³⁷ See H. Kantorowicz, "The Concept of the State," *Economica* (February, 1932) Vol. XII, No. 35, pp. 1-21.

CHAPTER V

THE LEGAL BASIS OF THE STATE

In comparing various systems of government with one another, among the first things demanding attention is the fact that all modern governments have a basis or foundation of law. This fact must be observed with care, for important consequences follow from it. The thoughtless observer, well aware that governments establish laws, may overlook the essential truth that laws often establish governments. This truth is not universal; history, even contemporary history, is filled with examples of *de facto* governments based upon force rather than law. Nevertheless, the modern state is built upon a legal basis; or, to change the figure, upon a framework of law, underlying all the activities of government. Even a government that owes its existence to force, will in every instance seek to transform or at least to disguise this condition, by establishing some sort of legal foundation. Manchukuo, Italy, and Russia, for example, despite the irregularities attendant upon the origin of their present governments, are now able to show constitutional and other laws which formally regularize these governments.

The legal basis provides for many different needs. It organizes the state: that is, it establishes special organs to carry on the various public functions. It provides for the rights and duties of the organs of the state, as well as for those of the individual citizens. The relationships among the state and its subdivisions, among the organs and agencies of government, between the state and its citizens—these and many other complex relationships are established by law and enforced by the application of law.

Although certain legal philosophers, such as Gierke and Duguit, are unwilling to admit that any law could be superior to any other, since they hold to the view that all law is theo-

retically absolute, for practical purposes we may assume that there is a hierarchy of laws. Using the word law in a very extended and general sense, to include all rules and commands which the state or its subdivisions can and will issue and enforce, we see that this hierarchy consists of four main classes: Constitutional law; statutory law; common and customary law; and a great variety of sub-legislative and administrative acts, decisions, ordinances, decrees, orders, and regulations. Each of these classes of law has its own special applications, its own methodology, and its own particular problems. The problems of constitutional law, for instance, are quite different from the problems connected with administrative orders.

The extent to which any or all of these different classes of law will be applied in a given state depends upon several considerations. Among such considerations are the following: Whether the legislature is vested with complete legislative power; whether the executive is an agent of the legislature or is coordinate with the legislature; whether or not the government examined is that of a federation with a powerful legislative authority in each member state, or that of a unified state such as France, with but one important legislative authority; whether there are numerous rule-making or "willing" bodies in governmental units smaller than member states; whether or not the administrative authority has broad powers to make regulations, rules, and ordinances.

The Constitution

At the head of the hierarchy of these various forms of law in our principal governmental systems, stands the written constitution.¹ Although this is a device of quite recent origin, hardly more than a century and a half old in its modern form, its use has become almost universal. All important states except Great Britain, and in fact nearly all contemporary states, are now governed, ostensibly at least, under written constitutions. These instruments generally organize the principal branches of the government, fix the powers and functions of

¹ This topic is so important as to demand extended treatment later; hence it is not developed at present.

each, and establish the relations of the various branches to one another. Even in Great Britain, which is often said to be governed by an unwritten constitution, several written constitutional laws provide for various matters of importance, in particular the rights of the people and the just and equal administration of law.

If one inquires the reasons for the rapid development of written constitutions, several answers present themselves. Many of the earlier constitutions, especially those of France (not including the present one), and some of the recently adopted European constitutions, were needed in order to clarify a changed situation. Each was written by a group engaged in the work of breaking away from a decadent governmental system and establishing a new system with a new philosophy, a new viewpoint, and different kind of machinery. Several of these constitutions were to a considerable extent the direct product of social and political revolution. Since habit, custom, and practice could not provide a framework of government under changed conditions, and since those who wrote each constitution were anxious to have a given set of principles adopted as the basis of the governmental system established thereby, it was natural that such principles should be set forth in the constitution itself.

All the republican constitutions which have been adopted as a result of the World War show the influence of current ideas in social and economic philosophy, and seek to form governmental systems more or less in harmony with contemporary social and political conditions. Several attempt to eliminate various kinds of class privilege and to establish popular rule in government. Others seek to bring about a unified and powerful state. All reflect the circumstances of their origin.

Examination of one or two important pre-war constitutions shows a somewhat different picture. There is little direct expression of social, political, or economic philosophy in the Constitution of the United States, except for that which was appended in the so-called Bill of Rights.² This Constitution

² For indirect expressions of philosophy, see C. A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York, 1913).

was truly an organic law, which sought to establish a working system of government. It is a striking exception to the rule that most written constitutions set forth systems, or at least express principles, of social and political philosophy. Much the same thing may be said of the present Constitutional Laws of France. But just as the United States looks to an extra-constitutional document, the Declaration of Independence, for the principles which most citizens accept or assume, so France looks to her Declaration of the Rights of Man and Citizen. In both cases, omission of such principles from the Constitution was necessary in order to propitiate the more conservative elements, and possible because the vast majority of people, more radical in their views, found these views already embodied and expressed in a Declaration which they believed to possess a certain force and validity as a control over the government.

This suggests another reason why written constitutions are popular today. The American Colonies and France during the period of their respective Revolutions, many European states in the middle of the nineteenth century, and many other countries at the beginning of the twentieth century, have displayed a lively fear and distrust of government, based on unfortunate experience. They have hoped in their constitutions to safeguard the citizens by setting forth clearly and plainly the relationship between the people and the government, and by placing various controls and limitations upon the government.

Constitutions, then, serve several purposes. They may embody in institutions, or express in words, the principles which are generally accepted as basic for the states concerned. They organize in more or less detail the structure of the government. They may provide various safeguards for the people against the government. They serve as frames of reference for all legislation and administration; and they may even occupy a position of such superiority that the legislature cannot alter or amend them in any way, and that any law which conflicts with a constitutional provision will be declared invalid by the courts. The value of some of these purposes is often disputed; but there is general agreement as to the usefulness

of having the framework of the governmental system organized in constitutions.

Statutory Law

Statutory law is usually defined as the law that is made in due form by legislative bodies in the regular exercise of their functions of lawgiving. It differs from constitutional law chiefly in the following respects: It is generally not so fundamental, and is often concerned with relatively minor affairs; it is passed by ordinary procedure, rather than extraordinary procedure; it is continually and regularly being made; and no extraordinary methods or procedures are necessary to change it. In most modern countries statutory law is made by legislative authorities which, in part at least, are representatives of the people, and are elected by the people.

One of the most remarkable phenomena of the past century has been the rapid growth of statutory law. The statutory law of England, France, Germany, or the United States, at the beginning of the nineteenth century, filled each year only a small volume, sometimes only a few pages. Almost every legislature has passed more laws or longer laws than the preceding one; until at present the laws passed in any of these countries during a given session will fill a very large volume, or even several volumes. An exception may be noted in the case of the totalitarian states, where statutes are used less frequently than decree-laws issued by the executive authorities.

This rapid development in the quantity of statutory law is due to several causes. One is the fact that feudal law, canon law, customary law, and common law were not equal to the needs of society after the Industrial Revolution. Thus, common law did not change rapidly enough to meet the demand for new rules and regulations to control rapidly changing social and economic situations. The common law governing the relationships between employers and employees, for example, has shown itself inadequate, and in some of its features absurd, when applied to new industrial conditions; the position of women under customary, feudal, canon and common law had to be changed by legislative enactment because it was entirely

out of keeping with social developments. Property relationships under the old feudal law and customary law have had to be changed by statutory law, as industrialism has multiplied the size of cities and raised new problems of sanitation and public health. Literally hundreds of old legal relationships and situations, rights and privileges, have been changed by legislative enactment. It is probably true today that the great majority of all human relationships are controlled or at least affected by legislative enactments, in countries where modern industrialism prevails.

Another reason, closely related to the preceding one, for the very rapid development in statutory law, has been the vast increase in governmental functions, such as care of public health, sanitation, charity, education, highways, and the furnishing of such services as transportation, light, water, gas, and electricity. To carry on such functions requires an elaborate organization, the establishment of the relationships of various authorities one to another, and the establishment of the relationships of individuals to these authorities, activities, and services. Elementary education, for example, has ceased to be a private and optional matter in all modern states, and has become a public and compulsory one. Statutes require the attendance of certain persons at school for a certain number of years; they establish the organization and supervision of the public school system, and fix the methods by which it is financed. Laws regarding public health must set up health authorities, define their functions and their duties, provide for the quarantine of persons suffering from contagious diseases, and cover many other contingencies. Much of the statutory law in any modern country will manifestly deal with such subjects. The need for the control of business and industry also accounts for numerous laws. Statutes have been made to govern banking, insurance, public utilities, trust companies, savings banks, building and loan associations, employment agencies, and numerous other special enterprises; there are also general laws to govern corporations.

Both the quantity and the nature of statutory law vary in different countries. The quantity of such law depends upon

several factors: first, whether or not there are within the country several legislative bodies, central and statewide or regional; second, the extent to which the ordinance, decree, or similar means of sub-legislative regulation is used; third, the degree to which the law has been codified; and fourth, the attitude of a given country toward government control and intervention.

In the United States, Australia, and other countries with a federal system of government, including not only a national legislature but also State legislatures, there will obviously be a far greater quantity of statutory law than in a country like France or England where there is but one legislative authority. For example, in the United States the total amount of legislation includes not only the statutes of the national government, but also those of the 48 States (not to mention territories). Since the States have general control over persons and property, the number of laws which each State enacts annually may be as large as the number enacted by the national government, or at times even larger. This means that no individual in the United States is controlled as to his various relationships by a single body of statutory law which applies equally to all the people, as in France or in England. It is necessary to learn what the law is in the particular State where one resides or wishes to transact business; as well as to study the laws of the United States concerning matters over which the national government has jurisdiction.

An important factor governing the extent to which statutory law is employed, is the use made of the ordinance, decree, or similar method of regulation. Where such devices are used liberally, not only may the number of statutes be greatly reduced, but the statutes themselves may be made much briefer and far more simple than when they must cover details. Therefore, as we shall see later, the extensive use of the ordinance power to elaborate, supplement, or put into effect the general principles which have been established by the legislature, does much in France, Germany, and Great Britain both to lessen the number of laws passed and to simplify the statutes.

In one sense *codes* may be considered as statutory law; but in the generally accepted sense *they are quite different*. A code

is a revision of existing law on a given subject, plus such additional new material as may be deemed necessary for completeness and clarity. A body of experts may be asked by the legislature to prepare a certain code, but the actual validity of the code depends upon its adoption by the legislature. Codes are usually prepared in a different way from that in which bills for laws are prepared; they cover a much larger range of subject matter, and they are much more systematic than ordinary statutes. They establish principles as well as lay down duties, prohibitions, penalties, and the like. There is no doubt that the codification which has been accomplished in France and Germany in respect to civil and criminal law and civil and criminal procedure, as well as certain other important fields, has greatly simplified the law and prevented the passing of numerous haphazard annual statutes upon the subjects of the codes, thus modifying both the actual and the potential quantity of statutory law.

Let us look at a single example. In 1934, the tax laws of France were codified. Before this time there were more than 160 laws, as well as numerous decrees, regulations and orders, governing the customs alone. Nearly the same number of laws existed regarding the indirect taxes, and a comparable number regarding the direct taxes. By the process of codification, these numerous laws were reduced to separate codes governing the special kinds of taxes, and requiring comparatively few pages for each kind of tax. Future tax legislation, under normal circumstances, will be more likely to take the form of amendments to this code than of long and elaborate bills.


If the statutory law is to be as brief and simple as may be consistent with the requirements of contemporary life, it is necessary to have as few legislative authorities as conditions permit; to place in the hands of the executive authority a large degree of power in respect to the issuing of decrees, ordinances, rules and regulations which supplement the law, or which organize the administration and arrange for its activities, instead of leaving all this burden to the legislature; and, finally, to codify the law on all important subjects in so far as this is reasonably possible.

Customary Law and Common Law

In all the countries which we are studying, a certain part of the law is found in neither constitutions, codes, nor statutes, but in the customs of the people, and in the decisions made by judges when no written legal provisions have appeared applicable to the matters that must be decided. These two types of law are called, respectively, customary law and common law. Although they may be superseded by provisions in statutes, codes, and written constitutions, unless and until they are so superseded, these forms of law are valid and are applied by the courts.

In such matters as the use of paths running across private property, and the use of springs and other sources of water, many a man has found to his chagrin that customary law recognizes the claims of the community, rather than the desire of the property owner to enclose his land and exclude his neighbors. The recognition of customary law in French jurisprudence goes so far as to uphold as valid the "publication" of laws and ordinances through announcements made by the town crier, in a colonial municipality where that functionary is the regular source of news.

It is sometimes difficult to distinguish customary law from common law, particularly since much customary law is embodied in judicial decisions. But on the whole, the distinction can be made. In every country, a judge will find himself confronted occasionally with a question which is not covered by any statute or other formal provision of law, or by any known custom. Therefore he must examine the principles used by other judges in deciding questions of comparable nature; failing this, he must seek for any general principles used as the basis of decisions, which can be made applicable to the question before him. To these he adds such statements regarding law and custom as he may be able to formulate, in order to clarify the grounds of his decision. This type of cumulative judge-made law is called common law, because it seeks to apply the commonly understood and commonly enforced principles of justice. The greatest development of common law has taken place in England and the United States.



Common Law and Civil Law

Although no country is without customary and common law, because it is never possible for the constituent and legislative authorities to anticipate every contingency, there is a great difference in this respect between France and Germany, where the use of common law is reduced to a minimum, and England and the United States, where the common law is still very important. France and Germany derive their legal systems to a considerable extent from the Roman civil law, which largely displaced or transformed customary and common law at the time of the Renaissance. An orderly arrangement of materials into codes covering the various subjects as systematically and completely as possible resulted from the study of the Roman law throughout Europe. England, while not oblivious to this influence, did not surrender to it, probably because the early development of law schools (Inns of Court) in the old tradition, and the compilation of Year Books containing reports of cases, had already given the common law a strong hold upon English juristic thinking.³ The United States later took its system of law and jurisprudence directly from England.

How does the common law of England and the United States differ today from the Roman or civil law as adopted by France and Germany? The civil law of France and the civil law of Germany are systematically expressed in written principles and rules, whereas the common law must be derived from reading many decisions. The law of France and Germany is largely codified, whereas the common law of England and America is not.

A very striking feature of the English and American common law is the extraordinary deference paid to precedents, which has no parallel in the Roman law. If possible, judges in the common law countries always follow precedents established in former decisions. Thus we often find judges in the United States going back to old English decisions in order to find precedents; and the judges of one State habitually follow the decisions of judges of other States. To meet new situa-

³ See F. W. Maitland and F. C. Montague, *A Sketch of English Legal History* (New York, 1915), p. 110.

tions, deductions and analogical criteria are made from principles and rules settled in former cases.⁴ Although in both France and Germany precedents are often followed, they do not have so great an authority as they do in England and the United States. Yet even in the civil law countries, common law has a necessary place.

Another important difference between the common law, and the civil law of the Continent, is the individualism of the former. The common law concerns itself not with social righteousness but with individual rights. It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe. Its respect for the individual makes procedure, civil and criminal, ultra-contentious, and preserves in the modern world the archaic theory of litigation as a fair fight, according to the canons of the manly art, with a court to see fair play and prevent interference. Moreover, it is so zealous to secure fair play to the individual that often it secures very little fair play to the public.⁵ On the contrary, the civil law, as set forth in the great codes, seeks to establish universal principles, by the application of which justice will be done as nearly as possible to all interests. The duty of both judge and lawyer, under the civil law, is to apply these fixed and known general principles to the case in hand. Not precedent, but logic, is emphasized; not the dicta of the obscure judges, but the so-called "doctrine" developed by professors of law and lawyers on the basis of the principles set forth in the code.

What are the advantages and what are the disadvantages of these two different systems?

The claim is often made that the common law system is much more flexible than the civil law system; that it is based upon concrete cases rather than upon theory; that it is practical rather than abstract; that it can more readily adapt itself to changing conditions than can a rigid code.

Those practicing the civil law reply that the civil codes are

⁴See T. F. T. Plucknett, *A Concise History of the Common Law* (Rochester, New York, 1929), pp. 303ff.

⁵Roscoe Pound, "The Law of the Land," *Dakota Law Review* (October, 1927), Vol. I, pp. 98-109.

quite as much the result of experience as is the common law; that the background of the codes is even older than that of the common law, because it can be traced to the magnificent legal system of the Romans; and that the codes are the result of ages of experience with countless problems, all of which have contributed to general solutions. Further, it is argued that a general principle is more flexible, more broadly applicable, than a judge's dictum covering a special situation more or less analogous to the question at hand; that by the very process of interpreting code provisions, a certain flexibility is attained; and that if the time comes when changes are necessary the code itself can readily be changed, whereas continuous minute changes brought about by judicial decisions make for unevenness and contradictions in law. Finally, it is claimed that whereas dependence upon common law makes a satisfactory legal theory and philosophy impossible, the very basis of codes is agreement upon definite principles.

Today there are certain difficulties in respect to each system. The chief difficulty of the code system undoubtedly is, that statutes almost inevitably change it in part—sometimes in large part, and quite rapidly. These statutes are interpreted by the courts, and there is consequently a tendency for a case-made law to develop, side by side with the code. Even in respect to the code itself, a great body of doctrine develops, through interpretation, over and beyond the strict provisions. It is not possible to know the real law on any subject merely from the code. One must also consult the cases that have interpreted the code. There is this, however, to be said for the code system: that at least one can find the general principles more easily there than in the common law system.

Certain difficulties have also developed in the common law system. Common law must always be interpreted in view of legislation which has modified it, since statutory law takes precedence over the common law. Very often the legislature seeks to establish, by statute, a principle entirely at variance with common law principles. The courts have a tendency to apply this legislation as far as possible by means of the concepts of the common law. Consequently, the law which is

actually applied may be neither the statute nor the old common law, but an undesirable hybrid.

Another difficulty in the United States arises from the fact that the common law of every member State is slightly different from that of every other. This is due to several causes, in particular: The inconsistencies and obscurities of the old English common law, and the changes which took place in it as time went on, all of which meant that the common law was not understood and interpreted uniformly by the States; a considerable variation from State to State in political, social, and economic conditions; and modifications made by different constitutional provisions and by different statutes which have some impact upon the common law. Thus, the common law in respect to water rights will not be the same in States where it is necessary to irrigate, and in certain eastern States which have no such problem; and statutes governing marriage, divorce, wills, and so on, differ from State to State and consequently have a different influence upon the common law in each State. Finally, the innumerable judicial decisions rendered each year in the various States make it impossible to know what the law is on certain points without searching through a great many cases. Were it not for elaborate cyclopedias, treatises, key systems and other technical aids, it would be absolutely impossible to follow the decisions that pour forth each year. Even with these aids, the cases from the various jurisdictions are often so conflicting that all which the searcher for precedent and authority can do is to guess, or to adopt the preferred set of arguments. This makes for great uncertainty; since a litigant never knows his rights under the common law, when as many precedents can be cited for one view as for another.

Several factors are tending to lessen the relative influence of the common law in England and the United States. The first of these, of course, is statutory law. In many significant fields, statutory law has almost entirely superseded the common law. "Legislation is continually undermining legal precepts, legal dogmas, and legal principles which we had identified with the common law."⁶

⁶ Pound, "The Law of the Land," *loc. cit.*

A second factor is the development of codes. There is a growing realization that some orderly statement of principles, and of the rights and limitations of all concerned in a given set of conditions, must supersede, so far as possible, the unsystematic and self-contradictory system of determining rights by means of scattered and incomplete statutes and judicial decisions. The attempt to translate this feeling into fact, however, has met with much opposition and has been a slow and long-drawn-out process.⁷

Another factor is the growth of administrative adjudication. In many instances, not the regular courts, but special administrative tribunals, are called upon to settle disputes in special fields. Often these tribunals are prevented from depending to any extent upon the old common law, because they are acting under the detailed provisions of some special law, under some code such as a Workmen's Compensation Code, a Health Code, or a Building Code, or even under sets of principles that they have worked out for themselves in the handling of particular kinds of cases. Procedures and processes are also likely to be highly specialized in such tribunals, and to be quite different from those of common law.⁸

For all these reasons, customary law and common law are of decreasing importance today, even in England and the United States. It is impossible, however, to predict their absolute extinction, as the continuous processes of change will always raise questions which have not been foreseen by the writers of statutes, codes, and constitutions, and which must be answered, in the absence of written provisions, according to customary law, common law, or some weighty judicial precedent.

Subsidiary Legislation

Sub-legislation, ordinances, and other acts of various authorities supplement the forms of law which have been discussed above. Because the legislative bodies of the world have

⁷ See C. H. Lobingier, "Codification," *Encyclopædia of the Social Sciences* (New York, 1930-1935), Vol. III, pp. 606-613.

⁸ See F. F. Blachly and M. E. Oatman, *Administrative Legislation and Adjudication* (Washington, D. C., 1934), Ch. V.

been confronted rather suddenly during the last few decades with a vast mass of complex social, economic and technical problems, for which solutions must be sought, it has become increasingly evident that they themselves cannot handle the entire field. They must depend upon subordinate rule-making agencies or upon various administrative authorities to pass detailed regulations.⁹ No legislative body can be expected to possess the expert knowledge needed to establish a workmen's compensation code, to devise the detailed provisions for the regulation of public utilities, to write the technical features of a health code, to plan every phase of a highway system or a scheme of forest conservation, to develop a complete system of control over business, or to plan in detail for the control of radio. Evidently a way must be found whereby the more detailed planning and regulating necessary for the carrying on of modern government can be transferred to other authorities. To what kinds of authorities should such work be given? There are in use today several solutions or partial solutions of this problem.

Legislative powers are often divided between the national legislature and the State or provincial legislatures. This is the solution necessarily employed in federations such as the United States, Australia, and Canada; but it is not confined to federations. In the United States, certain fields of legislation are given to the central government by an express grant in the Constitution; and the States retain the power to legislate concerning all other matters. In Canada, quite the opposite method of granting legislative powers has been established. The Constitution of Canada lists in detail the legislative powers which may be exercised by the provincial legislatures, and reserves the general powers of government to the central legislature.¹⁰

It should be noted that the legislative powers of the sub-

⁹ See James Hart, *Tenure of Office under the Constitution* (Baltimore and London, 1930), pp. 21ff.

¹⁰ Regarding Canadian Federalism and the distribution of powers it is interesting that despite the grant of residual powers to the Dominion government the courts have held that there are some powers *by nature local* and that these may not be interfered with by the Dominion government although not covered by the B.N.A. Act. See W. P. M. Kennedy, *The Constitution of Canada*.

divisions mentioned are not primarily of the sub-legislative order. The laws passed by a State or provincial legislature on subjects within its range of powers are statutes, quite as definitely as are the laws passed by a central legislature on subjects reserved to itself. But the legislature of a member State or province in a federation may also pass laws that are to all intents sub-legislation, when it is permitted to fill in certain details, or to define the application, or to organize the administration, within the given State or province, of a federal law.

It is quite evident that no division of powers between central legislatures and State or provincial legislatures can altogether solve the problem which we are considering. No legislature has the time, the technical skill, or the expert knowledge required in order to enact the mass of detailed regulations and rules needed by modern political society. Thus in the United States, although Congress has relatively few powers, it cannot exercise even those few to the fullest extent by means of direct legislation. It has not attempted to work out a full and complete code for the control and regulation of foods and drugs, the regulation of business, the regulation of forest lands and national reservations, or the operation of the Federal Reserve System. It has expressed its will in a general way, and has left certain details to be settled by such agencies as the Interstate Commerce Commission, the Department of Agriculture, the Federal Trade Commission, the Department of the Interior, the Federal Reserve Board, and so on. The State legislatures have been forced to do much the same thing in respect to the carrying out of certain functions.

This brings us to the next important method which must be considered: the granting of sub-legislative or subsidiary rule-making power to some specific executive or administrative authority, or the division of such power among the chief executive and other administrative agencies. This method has been employed everywhere to some extent, because of the necessities of administration; but in the United States the doctrine of separation of powers has prevented it from being officially recognized to as full an extent as might be desired. Very recently, indeed, conditions have made it impossible to deny longer

the fact that executive and administrative agencies do and must exercise a subordinate type of legislative power.¹¹

FRANCE. The simplest and perhaps the best method of exercising sub-legislative power is that employed in France. Here the general regulatory powers are bestowed upon a few authorities only, as the President of the Republic, the ministers, the prefects, and the mayors. The President of the Republic exercises an extraordinarily large regulatory power through the use of decrees. These decrees fall into two main classes: the decrees which regulate and control matters in a general way, governing a multitude of like situations; and the special or individual decrees concerning such matters as individual appointments to office or dismissals from office. The regulatory or general decrees are further divided into two classes: the ordinary regulatory decrees, often called simple regulations, and the extraordinary decrees which bear the name of regulations of public administration.

The ordinary regulatory decrees are issued under the President's power to see that the laws are executed. The ordinary regulatory decrees of the President of the Republic require in theory no special legislative authorization, and no action of preparation or approval by any other authority. As a matter of fact, however, since the President can act only with the countersignature of the Prime Minister or the minister whose departmental affairs are affected, to all intents and purposes his decrees are issued by the Cabinet or its various members.

Regulations of public administration differ from ordinary regulatory decrees in that they can be issued only under a special authorization of the legislature; they must be made after the advice of the Council of State has been received; and they have the force of law. They may deal with any subject which the legislature has requested the President to handle. The French doctrine of separation of powers does not prevent the legislature from giving the President the right to issue such regulations upon any matter.¹²

¹¹ See Blachly and Oatman, *op. cit.*, Ch. I.

¹² See Carré de Malberg, *La Loi, L'Expression de la Volonté Générale* (p. 74ff.).

The prefect exercises a certain regulatory power within the confines of his own department. This power is controlled by law, and sometimes by the approval of either the council general, the council of the arrondissement, or the central government. The acts of the prefect may also be controlled by the administrative courts.

The mayor in French municipalities exercises regulatory powers in respect to police, health, sanitation, and so on, which in the United States would belong to the city council. These powers are exercised under the control of the superior authorities, the prefect and the ministers. They are also subject to a special type of control by the administrative courts.

GREAT BRITAIN. An English authority says: "The action of our Acts of Parliament grows more and more dependent upon subsidiary legislation. More than half of our modern acts are to this extent incomplete statements of law. If any one opens at random a recent annual volume of public general statutes, he will not have to turn many pages before finding a provision that His Majesty may make Orders in Council, or that some public body or officer or department may make rules or regulations contributing some addition to the substance or the detail or the working of that particular act."¹³

The most important method by which supplemental or delegated legislative power is exercised in Great Britain consists in Statutory Orders in Council. Before the important administrative departments arose, with the ministers heading them made responsible to Parliament, the King in Council or the Privy Council made rules and regulations. But with the great development of the governmental departments, these gradually were given many powers formerly possessed by the Privy Council. Even today, however, despite the fact that so much regulatory power is entrusted to the administrative departments, the general rules governing their activities are issued, not by the heads of the department, but on the authority of Orders in Council. In the great majority of cases, in fact in all cases at present, such regulations are prepared by the minis-

¹³ C. T. Carr, *Delegated Legislation* (London, 1921), p. 1.

ter concerned. They are issued as Orders in Council as a matter of form.

Extensive powers of regulation and sub-legislation are delegated, not only to the ministerial departments, but to special agencies. As examples of such agencies we may mention the Railway and Canal Commissioners, and the Railway Rates Tribunal, whose powers extend over alterations in the classification of merchandise and many other matters, including variations in through rates, the fixing of group rates, tolls and terminal charges, and the reasonableness of various other charges and service conditions. The London Building Tribunal, the National Health Insurance Commissioners, the Board of Education, and the Board of Trade, all possess important powers of regulation and control. Many of these agencies, like comparable agencies in the United States, also exercise quasi-judicial powers in the settling of disputes or act as final appellate authorities.

THE UNITED STATES. In the United States there is a very complex situation in respect to the formulation of rules and regulations affecting both the administration and the public. The President cannot issue a decree or an ordinance creating new secretaryships, new governmental boards, commissions, and other authorities, and fixing their functions. This is done by Congress. Nevertheless, there always remains a good deal to be done by way of filling in the details of organization, fixing the forms of procedure and prescribing the methods by which various ends are to be achieved. Such matters are determined by supplementary rules and regulations. Ordinarily these are not made by the President directly, or even issued in his name; but are worked out by the department or agency concerned, in the forms of service orders or regulations. Under emergency conditions there is a tendency toward greater centralization, one expression of which is the issuing of many orders and regulations in the name of the President.

In respect to what the French would call regulations of public administration, or the Germans would call legal ordinances, or the English would call delegated legislation, the situ-

ation in the United States is not at all clear. The President undoubtedly possesses an independent regulatory power which may in practice be equivalent to sub-legislation. This is derived from the Constitution itself. Thus, the President can issue regulations as commander-in-chief of the Army and Navy; under his power of appointment he can issue civil service rules and regulations; he can establish military government in conquered territory and even set up civil government in such territory. He also has large regulatory powers in executing the laws of the United States.¹⁴

Theoretically, the President possesses no powers of sub-legislation; nor can Congress delegate to him any substantial part of its legislative authority. The same theory applies to other officers and agencies of administration. Many of these do in fact issue rules, regulations, and orders which have all the force of law, but there is not a clear understanding as to the forms and the nature of such acts. In the United States we have never been able to establish a reasonable and practicable theory regarding the relationship of the legislature to the executive and administrative branches of government, especially in respect to regulations which are legislative or sub-legislative in their nature. We have found it absolutely necessary to give wide power of regulation to various authorities, but have not been able to call it delegated legislative power, as is done in England, or to acknowledge that the legislature can empower the President to issue decrees or regulations of public administration which are in effect law, as is done in France. The courts have realized that some such delegations must be made in practice; but to avoid a conflict with prevailing doctrine they have introduced a new source of confusion, the conception of quasi-legislative or sub-legislative power. If they consider that a statute has the effect of "leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply," they will uphold the statute; but if they

¹⁴ See on this point J. P. Comer, *Legislative Functions of National Administrative Authorities* (New York and London, 1927), pp. 22ff.

consider that it confers "an unconstitutional delegation of legislative power," they will declare it invalid.¹⁵

In every country, the recognized forms of law are supplemented, developed, and applied by numerous acts of the executive and administrative authorities. Some of these acts are truly sub-legislative, though called by other names; some of them are merely administrative, in that they simply apply and carry out the law. The necessity of controls is also recognized, and various controls, judicial, parliamentary, and administrative, are provided. Although the courts may well be asked to prevent and to punish abuses of power, it is not their function to control the use of discretionary power, and it is not desirable that they should control the substance of sub-legislative acts. Unless other controls are provided, however, either the courts will do these things, or the administration will be freed from necessary restraints. All types of control are made much easier, when administrative acts are named and classified in a definite way (as regulation of public administration, statutory rule, legal ordinance, and so on); and when each kind of act produces certain legal consequences, is enforceable in a particular manner, may be opposed by given procedure, and may be issued only by regularly established authorities who are subject to definite and enforceable limitations.

The Courts and the Law

In addition to the four principal classes of laws and regulations just discussed, we must examine briefly a body of material which is also, in effect, a part of the law, although it has not been made by any constituent or legislative authority, or any authority invested with sub-legislative power. Many principles which are generally accepted and used, in respect to such matters as methods of carrying out governmental functions, the relationships of the citizen to the government, and the relationships of governmental units and authorities to one another, are not determined by the Constitution, are not established by statutory laws, are not laid down in regulations and rules, are

¹⁵ *Schechter v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935).

not recognized as a part of the common law, and are not even the results of custom and practice, but have been formulated by the decisions of courts and administrative tribunals.¹⁶

For example, in the United States, the relationship of the city to the State has been largely built up by the courts. This is so even in those fourteen or more States whose constitutions have attempted to grant to cities so-called home rule.¹⁷ In England, and in both the national and the State jurisdictions in the United States, many of the principles which determine under what conditions an individual may bring suit against the state have been developed, not by the legislatures, but by the courts. In France, most of the rights of officers have been established, not by the Constitution or through laws, but by the Council of State, the chief administrative court. In Germany, the method by which a person injured by an officer exercising the public power entrusted to him may bring a suit, has been determined largely by the *Reichsgericht*, the supreme civil and criminal jurisdiction. The principle that the constitutionality of laws may be tested before the courts in the United States is not laid down by the Constitution or in statutes, but has evolved by judicial decision. Hundreds of like examples could easily be given.

It is not difficult to explain why this is so. We have seen that a constitution should deal only in a general way with a few subjects. Laws cannot be made detailed enough to cover the complexities of administration. Customary law and common law may seem inapplicable to new conditions. Regulations and rules cannot cover all possible contingencies that arise in connection with the carrying out of governmental activities. Even if such subjects could be adequately covered by constitutions, laws, regulations, rules and orders, in point of fact they never are. Moreover, when such acts do cover a given field, they must still be interpreted. Some court or administrative tribunal is nearly always asked to interpret an important act, usually in deciding a suit based upon it. The courts and tri-

¹⁶ See Blachly and Oatman, *op. cit.*, Ch. II.

¹⁷ For striking examples of this fact see H. L. McBain, *The Law and the Practice of Municipal Home Rule* (New York, 1916).

bunals establish the meaning of countless provisions of constitutional, legislative, administrative or regulatory nature, and in so doing, frequently add to the substance of the law.

Summary and Conclusions

The law, in manifold forms, is the basis of the modern state. All that may be done and may not be done by the agencies, officers, and citizens of the state, is fixed by law, so far as this is humanly possible. The nature and the relationships of the public authorities, and even the conditions of citizenship, are also fixed by law.

The law is composed of many different elements, contributed from different sources. *Constitutions* and *statutes* are usually made, or perhaps enacted subject to ratification, by special bodies called by such names as constitutional assemblies or legislatures. *Administrative authorities*, sometimes with and sometimes without special and formal delegations, make regulations and rules which are in reality a part of the law. *And the courts*, in interpreting and applying the law in all its forms, inevitably add to its content. That is to say, the law of a land is formulated in different ways and by different agencies. In the modern state the legislative function is exercised primarily by a specially constituted legislative body, and the ordinances, rules, and regulations made by other agencies of government, under authority of a constitution or statute, are none the less law, albeit supplementing law; and they often have a more immediate effect upon the life of the individual than do the general statutes. Thus, a few individuals are affected by statutes forbidding murder, whereas nearly everyone is affected by sanitary and traffic regulations.

This does not mean that the administration or the courts or popular custom are, or should be, equal in all respects to the legislature as sources of law. Under every free constitution, the great task of making the body of the law, of outlining its general scope, or fixing definite limits upon certain kinds of acts and rights and privileges, is given to the legislature. The legislature ought to see its duty largely, and perform its duty by expressing its will on all important matters so clearly that

there will be no room for misunderstanding, or for additions to the substance of the law, except in detail, by any other agency. At the same time, it should legislate as briefly as possible, enact codes whenever this can be done, and leave the regulation of details to properly controlled administrative agencies. So far as possible, the courts should interpret and apply the law with great care to carry out the intent of the legislature.

Does this basis of law narrow and hamper the life of society and of the individual? On the contrary, it is the universal experience that only in a state which is provided with an adequate legal basis, with a law that is just, modern, and comprehensive, can any real freedom be found.

CHAPTER VI

MAKING CONSTITUTIONS

Since all modern states, and indeed many states which can hardly claim to be modern, are governed on the basis of constitutions, it is necessary to consider what constitutions are, how they are made and amended, and what they contain.

Nature of a Constitution

Constitutions are plans or systems of governmental organization, according to which the principal branches and agencies of government are established, their respective powers and functions are assigned, and their mutual relationships are outlined. These plans or systems are often set forth in a single written instrument; but such important exceptions as the Constitutions of France and of Great Britain show that the same results may be achieved by other means. In France, a group of constitutional laws, complemented by a few other important statutes, form the Constitution. In England, much of the Constitution is unwritten, but custom, usage, and common law make its outlines quite clear. Certain statutes, including Magna Carta, the Bill of Rights, and the Parliament Act of 1911, are recognized as parts of the British Constitution. With these various examples in mind, we may say briefly that constitutions are organic laws, whether written or unwritten.

It is true that a constitution may be much more than a law which organizes the government. It may state, or imply, the social and political creed of its writers, when the majority of these represent a single party or school of thought. It may, and often does, establish institutions and make provisions which are compromises among the opposing views of various influential political and social groups represented in the making and amending of the constitution. The philosophical and practical considerations on which it is based may be stated at length, as

in the earlier French Constitutions; or expressed through the institutions, organs, and agencies which are established, as in most American state constitutions; or set forth in part by words and in part by institutions, as in the Weimar Constitution of the German Reich.

A constitution may or may not be enforceable by the courts like other forms of law; or certain articles or parts of constitutions may be thus enforceable whereas others may not.

A. The Making of Democratic Constitutions

Like every other form of law and regulation, constitutions must be amended from time to time in order that they may serve the needs of a changing social, economic, and political order. Less frequently, new constitutions must be made. Our own country, with its 48 federated States, has seen the creation of a considerable number. The problems connected with the making and amending of constitutions are not simple, nor are the answers always based upon pure reason.

It must be remembered that the majority of the important national constitutions now in effect were written during, or immediately after, revolutionary changes in the political situation. A pressing sense of the need for speedy organization led to the use of whatever method of obtaining such organization seemed most feasible at the moment. This can be understood by a brief survey of the conditions under which several constitutions actually came into existence.

France

In France, according to the terms of the Armistice with Germany signed in 1871, a National Assembly was elected by universal manhood suffrage, and was given power to negotiate and act in respect to peace and war. This Assembly not only made peace with Germany, but, going far beyond its powers, governed France from 1871 to 1876, and formulated the present Constitution of 1875. It had no legal authority to do this. The Constitution which it created consisted of a law of February 24, 1875, upon the organization of the Senate; a law of February 25, 1875 upon the organization of the public powers;

and later (in September, 1875), a supplementary law as of July 16, 1875, regarding the relations of the public powers. These constitutional measures were enacted as ordinary laws, and were not submitted to a popular vote or any other expression of popular approval. Their enactment was, to say the least, irregular, since the Assembly was exercising a power which had never been bestowed upon it. Nevertheless, these same laws, amended in certain respects, are the constitution under which France is governed today.

Republican Germany

The domestic political situation of Germany at the close of the World War was exceedingly complex. Although it had been evident for some little time that only a miracle could save the monarchy, it was by no means clear what kind of government would succeed it when it fell. The powerful Social Democratic Party wished to establish a parliamentary republic; its chief rival, the Independent Socialist Party, was interested rather in reorganizing the economic life and perhaps establishing a "dictatorship of the proletariat." The influence of the more extreme elements in this party was shown in the organization of Workers' and Soldiers' Councils, such as had played a colorful part in the Russian Revolution. There were many other political groups and parties of minor importance, which added to the general confusion and uncertainty.

On November 4, 1918, a revolutionary march to Berlin was attempted by marines in the service at Kiel. This was the first of many revolutionary demonstrations, which led to the abdication of the Kaiser on November 9. The leader of the Social Democrats, Scheidemann, at once seized the opportunity to declare Germany a Republic. The retiring Chancellor had transferred his office in very informal fashion to another important Social Democrat, Ebert, who later became the first President of the new Republic. A working agreement was made between the party which had thus assumed power, and the Independent Socialists. The two parties formed a Cabinet, known as the Council of the People's Commissaries, in which each party had three representatives. This government signed the Armistice.

Within a few days, a National Congress of the Workers' and Soldiers' Councils which had been formed in many parts of Germany voted in favor of the convocation of a Constituent Assembly. The acting government called an election for such an Assembly, to be held on January 19, 1919. Conditions were fixed by a Cabinet decree, rather than by any previous constitutional or legal provision. In this election, the advocates of parliamentary government triumphed, and it was evident as soon as the results were announced that the proposed Constitution would organize a parliamentary Republic.

Meanwhile, several attempts were made by Communist groups and by the extreme left wing of the Independent Socialists to seize power. These were all put down by the government, from which the Independent Socialists were forced to withdraw.

The Assembly came together on February 6, 1919. Within a few days it had established a provisional form of government, supported by a coalition of the three parties which had the largest representation in the Assembly, the Social Democrats, the Centrists, and the German Democrats. The Assembly itself exercised temporary legislative powers. Provision was made for an acting President (Ebert), and an acting Chancellor (Scheidemann), at the head of a ministry responsible to the Assembly. The Assembly thus controlled the government while drafting the Constitution, and even later, until under the new Constitution a Reichstag (national legislature) could be elected. On July 31, the Constitution was adopted by the Assembly, and on August 11, 1919, it was promulgated and published. It went into effect immediately, without being submitted to the people for ratification.

When Hitler and the National Socialist Party came into power, they succeeded, by a series of steps all of which had a certain appearance of legality, in effecting changes in the Weimar Constitution so deep and so significant as to make the original instrument unrecognizable. Yet the Constitution has never been repudiated, and such of its provisions as have not been superseded are still a part of the law. Germany has no other Constitution today.

The United States

Under the Articles of Confederation of the United States, Congress had power to conduct military and internal affairs, to coin money, to fix the standard of weights and measures, to control Indian affairs, to conduct and regulate post offices, and to settle disputes between the States. It had no power to levy taxes, but must depend upon the States to contribute their respective shares to national expenses. It had no power to act directly on individuals in any matter, or to regulate foreign or interstate commerce. In practice, this system worked ineffectively. The matter of finance alone made the whole scheme inoperable.

As a result of disputes and conflicts of jurisdiction, it became important for States having common interests in the navigation of certain rivers to reach a definite agreement about them. Virginia and Maryland appointed Commissioners to consider this topic in regard to the Potomac River. These Commissioners met at Mount Vernon at the request of George Washington, and agreed not only upon uniform regulations on various subjects connected with their mandates, but upon a Convention of all States, to take into consideration the trade and commerce of the Confederation. Such a Convention of representatives of five States met at Annapolis in September, 1786. Because of the small attendance, the Convention did not deem it advisable to proceed with the business of its mission. The delegates suggested that a Convention of representatives of all States meet at Philadelphia in 1787. Congress passed a resolution favoring the suggested Convention. All the States except Rhode Island sent delegates. These delegates had no definite instructions even for the changing of the Articles of Confederation; but they assumed the power to draw up a new Constitution.¹

The new Constitution, according to its own provisions, was to supersede the Articles of Confederation, instead of amending them in accordance with their provisions for amendment.

¹ Any edition of Madison's *Debates in the Federal Convention of 1787* may be consulted. The debates of May 29 and May 30 are of especial interest as showing the assumption of power to act beyond instructions.

It was to take effect when ratified by nine of the thirteen States. This point is important, because it meant that the Constitutional Convention was refusing to be bound by existing legal requirements. The Articles of Confederation had provided, in regard to amendments: "Nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterward confirmed by the legislatures of every State." This constitutional method of changing the Articles of Confederation was utterly disregarded by the Philadelphia Convention, perhaps because the delegates felt that their bold and revolutionary action in writing a new Constitution was not likely to be favored by all the State legislatures.

The proposed Constitution was laid before Congress, and Congress submitted it to a Convention of delegates chosen by the people in each State, with the exception of Rhode Island, which had refused to call a Convention. Eleven States ratified it.

Great Britain

The British Constitution is in part an exception to the foregoing rule; but only in part. Many of its important written elements, such as Magna Charta, the Bill of Rights, and the Reform Acts of the nineteenth century, were the direct results of periods of disturbance. Thus, King John was "driven to the alternative of deposition or acceptance of the guarantee of liberties which the barons, the church, and the people were united in demanding of him. The upshot was the promulgation, June 15, 1215, of Magna Charta."²

The Bill of Rights was passed as a consequence of the Revolution of 1688, which drove the Stuarts from the throne of England. It made provisions against the recurrence of various grievances which had led to the revolution, such as "the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament," and "levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament." Furthermore, it guar-

²F. A. Ogg, *The Governments of Europe* (New York, 1934), p. 9.

anteed such rights (most of them old rights newly claimed) as the free election of members of Parliament, freedom of speech and debate in Parliament, the due impanelling and return of jurors, and the protection of the subject against excessive bail, excessive fines, and cruel and unusual punishments.³

The Reform Acts of the nineteenth century, especially the first and most important one, that of 1832, came into existence as the result of a long series of disturbances, military, political, and economic. "The industrial changes of the previous half-century [before 1832], the long wars, the recurrence of financial crises, and the wretched system of poor-law administration, had all tended to create a turbulent, suffering class."⁴ The Chartist Movement and many other expressions of popular dissatisfaction, and the incessant economic-political agitation which followed the Industrial Revolution, had a profound effect in developing the British Constitution, particularly as regards the extension of the franchise.

General Conclusions

The Constitutions just described had very similar origins, in that all, with the partial exception of the British Constitution, were adopted during times of great excitement and political and social stress, and they were formulated by extraordinary bodies which had not been provided for in previously existing constitutions or statutes. Not one of them was submitted directly to the people for ratification.

Much the same thing can be said of practically all the constitutions which were adopted as the result of the World War. In complete disregard of any provisions that earlier constitutions or other basic laws may have contained regarding the constituent power and procedure, the new constitutions were established by bodies or groups which grew up out of the troubled situation.⁵

It is difficult, therefore, to find in the facts of history any

³ 1 Wm. and Mar. sess. 2, c. 2 (1688).

⁴ Jesse Macy, *The English Constitution* (New York, 1909), pp. 419-440.

⁵ Consult M. W. Graham, *New Governments of Central Europe* (New York, 1924), for valuable descriptions of the circumstances leading to the adoption of several new constitutions.

answer to theoretical questions as to the kind of agency by which national constitutions should be made, and the processes by which they should be made and ratified. Evidently they will be made by such groups as rise to power in times of extreme stress. It very seldom happens that a national constitution is discarded as obsolete and replaced by one expressing a new political, social and economic outlook, without the impetus of such disturbances as have generally accompanied or preceded the creation of these instruments. The example of Japan can hardly be considered as meeting such conditions. The new Constitution of the Soviet Union, it is true, was created peacefully, but it does not represent a serious break with the philosophy of the earlier one.

The origin of constitutions for the member States of a federated nation may resemble the origin of the national constitutions; but on the contrary it may be totally different. In the United States, the majority of State constitutions are by no means the outgrowth of revolution or other great emergency. Since they do not possess the factitious sanctity which attaches to our national Constitution, they are changed from time to time. In fact, it may almost be considered a tenet of our political creed that an occasional Constitutional Convention shall be called in each State, either by the legislature or by some other authority which the State constitution itself determines: and that such Convention shall formulate a new constitution or a series of constitutional amendments, which shall finally be submitted to a plebiscite for adoption or rejection. Although certain exceptions exist, this methodology is common in our member States.

B. Making Totalitarian Constitutions

Russia

Of the three great totalitarian states, Russia alone embarked upon a plan which necessitated the complete subversion of old forms and laws and the creation of a new Constitution. As noted below, the dictators of Italy and Germany were able to avoid the appearance of a complete break with legality and to

accomplish the desired changes by legal or quasi-legal means. Theoretically, in both cases, the old constitutions remain the basic law even though they have been drastically amended or in practice largely disregarded.

Clearly this was not possible in the case of Russia. For many years before the Revolution of 1917, various leftist groups had been making plans for the overthrow of the Tsarist regime and the organization of a Socialist state more or less closely patterned after the ideas of Marx. Nearly all persons who seriously envisaged political change saw it in these terms; so that when the Revolution came at last, a Socialist state of some kind was inevitable. All the old institutions and symbols were abolished to be replaced by others in keeping with the newly established "dictatorship of the proletariat." Councils called Soviets developed everywhere and became the basic units of the new system. Following the Bolshevik *coup d'état* of November, 1917, which destroyed the Kerensky Provisional Government, the central Congress of Soviets passed a law which might be described as a temporary Constitution. This law declared that supreme authority belonged to both the Council of People's Commissars and the Congress of Soviets together with its Executive Committee. The Commissars (heads of departments) were described as "responsible before the Congress," but the law did not explain the degree or kind of responsibility. The question was academic with Lenin in control.

The next step was the calling together of a Constituent Assembly chosen by popular vote. For nearly a century Russian political reformers had longed for the day when such a body could assemble and deliberate freely in order to devise a genuinely democratic instrument of government for Russia. But the Bolshevik faction had been unable to secure a majority in the Assembly which met on January 5, 1918. Together with their allies, the left Social Revolutionaries, they could muster only 235 votes. They were opposed by 492, mainly right-wing Social Revolutionaries. But the Bolsheviks maintained a firm control of the troops and the Soviets. When the Constituent Assembly refused to recognize the Soviets' authority, it was immediately dispersed by Bolshevik command.

No further chances were taken with an elected constituent body. The Congress of Soviets immediately adopted two resolutions reminiscent of the French revolutionary tradition as to title: "The Declaration of the Rights of the Laboring and Exploited Masses," and "The Declaration of the Rights of the Peoples of Russia." These resolutions expressed the fundamental principles which were declared to underlie the revolution and which were to be the inspiration for the new Constitution. With Lenin's approval the Central Executive Committee appointed a drafting commission in April, 1918. This body had a majority of Bolshevik members. Its labors were approved by Lenin on July 3, 1918, and a week later the draft was enacted by the fifth Congress of Soviets as the Constitution of the Russian Socialist Federated Soviet Republic.

This Constitution reflected the revolutionary idealism of its makers and the peculiar circumstances of its origin. It opened with a preamble which repeated the Declaration of the Rights of the Laboring and Exploited Masses. Social and economic classes were declared abolished; and land and instruments of production were made the property of the workers. The governmental system was based upon a series of Soviets which represented the workers only. A hierarchy of Soviets was established, with the All-Russian Congress of Soviets at the top. National minorities were recognized and organized into Autonomous Republics and regions within the federation.

Following the adoption of this Constitution, the Bolsheviks were forced to defend themselves against foreign intervention and civil disturbance. Only a virtual dictatorship could accomplish this, especially in view of the fact that the Bolsheviks remained a minority group and that the vast masses of Russia were politically inert. The Constitution remained, then, more of an ideal than an actual framework of government. The real government was the dictatorship of the Bolshevik Party with its disciplined hierarchy unified by the genius of Lenin. "Revolutionary expediency" was held to justify many departures from orthodox Marxism.

By 1920 the success of the new regime was assured. The Red Armies were triumphant and new Soviet governments had

appeared in several areas outside the R.S.F.S.R. In December, 1922, treaties of union were signed with the Ukraine, White Russia, and the Transcaucasian Federation. Lenin and his associates decided upon a genuine political union with these states, which was duly accomplished by the creation of the Union of Socialist Soviet Republics. The Constitution of the Union was prepared by an All-Union commission dominated by the Communist leaders and was put into effect in July 1923.

Although the Constitution provided that ratification and amendment of the Constitution should be the exclusive province of the All-Union Congress, in fact it was put into effect by action of the Executive Committee and only ratified subsequently by the Congress. Similarly, constitutional changes have since been made almost always by the Executive Committee, later ratification by the Congress taking place almost automatically. For example, Commissariats (ministries) have been abolished, created or altered by action of the Executive Committee on many occasions.

When, in the view of party leaders, the time had come to express Soviet accomplishments in a new "democratized" Constitution, the drafting was entrusted to a special commission under the chairmanship of Stalin. The only part played by the Congress of Soviets in the creation of the new Constitution was in the appointment of this commission. The draft written by this body was confirmed by the Central Executive Committee and published on June 12, 1936, with an invitation to the public to give it full consideration and to send in proposals for change. It was said that 154,000 proposals for amendments were received.

An Extraordinary All-Union Congress was elected for the purpose of adopting the Constitution. It met in November. After a number of delegates had spoken with enthusiastic approval of the new fundamental law, it was accepted in a general way by acclamation. A revising committee of 220 members, with Stalin as chairman, was then appointed by the Congress to consider the suggested changes. This committee contained the entire membership of the Communist Party Politburo as well as most of the membership of the original drafting com-

mission and a number of representatives of various professions. It reported the document back to the Congress, with a few proposed amendments. The reported draft was unanimously adopted by the All-Union Congress, after its approval by the Presidium, on December 5, 1936.

Italy

The Constitution of Italy is still, in theory, the Constitution given to Piedmont in 1840. Various amendments have not changed this *Statuto fondamentale* beyond recognition. The unification of Italy, which was practically completed in 1870, merely extended geographically the application of the Constitution.

The system of government established by this instrument resembled in its external features the British system. It was a constitutional monarchy, with a ministry responsible to the legislature. Laws and official acts of the King were to be countersigned by Cabinet members. The legislature was bicameral, with an upper House called the Senate, and a lower House called the Chamber of Deputies. The Senate, which still survives, consists of princes of the royal blood who have reached the age of majority, and of other members more than forty years of age, who are distinguished by reason of public service, scholarship, and so on. These members are appointed by the King, and hold office for life. The Chamber of Deputies was elective (since 1913, by universal male suffrage). The ministry is required by the Constitution to be responsible to the legislature as a whole, but its real responsibility in the past has been to the Chamber of Deputies, now abolished.

Although this system may appear to be liberal and moderately democratic, it has not been so in reality. The Chamber of Deputies has often been the servant, rather than the master, of a powerful Prime Minister. The class and partisan divisions in Italian society have been very deep, so that a united front against the manipulations of Prime Ministers has been difficult to achieve. Hence the dictatorship of Mussolini is not so definitely opposed to Italian institutions in fact as in appearance.

Although the "March on Rome" can hardly be called a legal

action, the forms of legality were observed when Mussolini became Prime Minister. Moreover, the forms of legality have been observed in the passing of laws which almost replace the Constitution of 1848, leaving only a few articles of that fundamental law untouched.

An important change in constitutional law makes the Prime Minister responsible to the King rather than to the legislature.⁶ The other ministers are made responsible to the King and the Prime Minister—which means under present conditions that they are responsible to Mussolini.

Practically complete legislative power is bestowed upon the Cabinet. This body is authorized to modify the provisions of laws of public safety,⁷ to make amendments to the penal code, the code of penal procedure, and the laws affecting judicial organization and the ministry of justice;⁸ also to issue decrees having the force of law, either when powers have been delegated by statute, or "in exceptional cases when urgent reasons demand action."⁹ A certain degree of parliamentary control formerly existed, especially over the decree-laws applying to exceptional cases.

Until quite recently the framework of a bicameral legislature remained in Italy. The Senate still exists, chiefly as a group of persons considered worthy of honor. On March 23, 1936, Mussolini announced the suppression of the Chamber of Deputies, and its replacement by the Chamber of Fasces and Corporations. The powers and duties of the latter have not yet been made public.

A remarkable organization, which acts largely in an advisory capacity, but which also exercises various legislative and administrative powers, is the Grand Fascist Council. The Duce is the president of the Council, and the secretary of the National Fascist Party is the secretary of the Council. It will be shown later in this study, that the Grand Fascist Council coordinates the policies of the Fascist Party with those of the

⁶ Law of December 24, 1925, No. 2260.

⁷ Law of December 31, 1925, No. 2318.

⁸ Law of December 24, 1925, No. 2260.

⁹ Law of January 31, 1926, No. 100.

government. The advice of the Council must be asked regarding all questions of a constitutional nature.¹⁰

Various other fundamental laws passed since Mussolini came into power have left the Constitution of Italy an empty shell. The powers of government are no longer divided among the organs established by the Constitution. All effective power lies at present in the hands of Mussolini and the Fascist Party.

Germany

The supporters of Hitler maintain firmly that the destruction of the German Republic and the creation of the Third Reich were brought about by legal methods, and that the Third Reich rests upon a foundation of law. How much or how little this contention means, must be decided in view of the facts.

There is no doubt that Hitler became Chancellor of the Reich in a perfectly regular manner. On January 30, 1933, President von Hindenburg, evidently convinced that no other person could form a Cabinet which the Reichstag would support, offered Hitler the Chancellorship. This offer was accepted at once. On the same evening, a great parade, composed in large part of Storm Troops and Shock Troops, was held in Berlin. This procession was both a show of power and an attempt to evoke popular enthusiasm and support for the Nazi regime. It cannot be said that the parade was illegal, whatever may be thought of its implications.

But no talk of regularity and legality can conceal the fact that when the National Socialist Party came into power, the German Republic was doomed. It is impossible to see in Hitler's acceptance of the Chancellorship and his subsequent actions any intention of fulfilling his legal duty to uphold the Weimar Constitution. On the contrary, the entire history of the Nazi Party and its leader shows a determination to destroy the existing legal order.

Although the purposes of Hitler were revolutionary, his methods were not those generally associated with revolutions. Apparently he had learned from experience that it is a dangerous and uncertain matter to carry arms against the state. He

¹⁰ Law of December 9, 1928, No. 2693.

preferred to obtain power by political strategy, and to use that power, with the increased prestige accompanying it, to fulfil his purpose of bringing in a new order, the Third Reich.

As a step in this direction, the Hitler Cabinet soon decided to have the Reichstag dissolved and another election held. The election, which took place on March 5, 1933, gave the Cabinet an absolute majority of seats. On March 24 the new Reichstag passed an Enabling Act which bestowed upon the "national government" for a period of four years a grant of power so broad as to permit the Cabinet to make and administer any laws whatsoever, including laws of a constitutional nature.

Even this astonishing display of tractability was not enough to satisfy Hitler, since the Reichstag still contained members of parties other than his own. A decree of dissolution was issued in October, and another Reichstag was elected on November 12, 1933.¹¹ Laws passed by the Cabinet in the meanwhile had made the National Socialist Party the only party which could legally exist. Hence the November election was not a choice among party policies, but merely an opportunity to ratify the National Socialist list of candidates. The new Reichstag contained no single individual who might conceivably oppose Hitler's policies. Thus within less than a year, by means of a few steps all bearing some color of legality, Hitler and the National Socialist German Workers' Party had destroyed the Republic and crushed all effective opposition.

Despite the ostensible legality of the acts just mentioned, much illegality and much brutality were employed by the Nazi group in dealing with those who dared to oppose them, and with all Jews. Abuses of this nature have occurred not once or twice, but repeatedly.¹² It is not possible to describe the period of Hitler's entrance into power, without mentioning these facts. The "legal state," the German commonwealth in which all rights were protected, no longer exists.

The Third Reich has not concerned itself, so far, with the matter of a new Constitution. It is an interesting legal ques-

¹¹ *Reichs-Gesetzblatt*, 1933, Teil I, p. 729.

¹² See C. B. Hoover, *Germany Enters the Third Reich* (New York, 1933), pp. 101-124.

tion whether the Constitution of Weimar is still in effect. The attitude taken by jurists is, that such parts of it as have not been superseded by laws of the Third Reich, and are not inconsistent with the principles and outlook of the National Socialist Party, are valid.¹³ It is to be anticipated, however, that all parts of the Constitution will in time be replaced by laws of later date. There is no indication at present that the Third Reich intends to adopt a new Constitution.

There are few external resemblances among the fundamental laws of Germany, of Italy, and of Russia. Germany and Italy have not formally discarded their constitutions, the one republican, the other establishing a limited monarchy. Russia at first adopted a constitution of a new and interesting type—a pyramid of councils—and later replaced it by a system with many superficial resemblances to an ordinary representative democracy with responsible government. The dissimilarities here are obvious.

Yet the three systems have a common feature which is more significant than all their differences. This common feature is a concentration of the highest legislative and executive power in a single organ: in Germany the Cabinet; in Italy the ministry; and, in Russia, the Presidium of the Supreme Council. In all three countries the traditional separation of powers is rejected with the avowed intention of strengthening the men and the parties in power, so that they may retain and consolidate that power. Russia's new Constitution, it is true, provides for a legislative body; but so long as this is guided and controlled by a Presidium or permanent executive committee which possesses important legislative, executive, and judicial powers, there is little resemblance to the separation of powers established in the democratic states.

C. Changing Constitutions

Ordinarily, the changing or amending of a constitution is achieved more easily and under conditions of less stress than is the adoption of a constitution. Before this subject is con-

¹³ See Otto Meissner and Georg Kaisenberg, *Staats- und Verwaltungsrecht im Dritten Reich* (Berlin, 1935), pp. 15-17.

sidered, it should be noted that not all constitutional changes are formal written enactments. Constitutions are changed by custom, and by legislative and judicial interpretations in application of their provisions. It often happens that after many years, a given clause in a constitution produces effects which were neither intended nor even remotely foreseen by those who composed it. A careful study of the Constitution of the United States, which is the oldest written constitution now in effect, demonstrates this truth. The fathers of the Constitution would not recognize certain present-day applications of their work—for example, the powers assumed by Congress under its authority to regulate interstate commerce, and possibly certain powers exercised by the United States Supreme Court.

In naming the most important methods by which written constitutions are changed, we find that the list includes formal amendment, statutes, judicial decisions, party actions, legislative usage and other customs, and, in general, changed conditions which develop certain clauses to an amazing extent, and leave others in a state of "innocuous desuetude."

Changing Constitutions by Formal Amendment

Formal amendment should be foreseen by the makers of any written constitution, and provisions governing the process should be included in the document. If this is neglected, there may be an actual revolution when changes are necessary; or the legislature, acting as an agent of the people, may be compelled to call together a convention similar to that which perhaps originally framed the Constitution; or the constitution may be openly flouted and broken. As a matter of fact, all written constitutions now in effect contain provisions for their own amendment.

Several important questions must be answered in connection with the process of formal amendment: How are amendments to be proposed? In the case of federations, should member States as such have any power of initiating amendments to the federal Constitution? Should the people have any direct power of initiating amendments? What should be the power of the legislature in respect to the initiation of amendments? How

should amendments be ratified? In federations, what part should the States as such have in the ratification of amendments? What part should the people have? What should be the part of the legislature? What significant political and governmental results follow from the amending process?

Before endeavoring to answer these questions, it is desirable to examine the amending process in the Constitutions of a few important countries.

FRANCE. The Constitutional Laws of France provide for their own amendment. Article 8 of the Law of February 25 reads:

The Chambers shall have the right, in separate resolutions adopted in each by a majority vote, either of their own accord, or at the request of the President of the Republic, to declare that the Constitution ought to be revised. After each of the two Chambers shall have passed this resolution, they shall meet together as a national assembly, for the purpose of proceeding with the work of revision. The discussion upon the partial or total revision of the Constitution must be decided by an absolute majority of the entire membership of the national assembly.

Accordingly, the National Assembly by an absolute majority vote can at any time amend the Constitution. In other words, an extremely easy and simple method of amendment was adopted. Historical circumstances were largely responsible for this. "The Left as well as the Right wished to render as easy as possible the future transition from the purely temporary regime which they thought they were founding, to the final, permanent regime which was the object 'of the hopes and beliefs of all.' " ¹⁴

ENGLAND. In England the amending process is a legislative process. Although England does not have a well-defined written Constitution, she does have fundamental law, much of which is written. This law is not distinguishable from ordinary law in any formal way. "It is sometimes said that Parlia-

¹⁴ Charles Borgeaud, *Adoption and Amendment of Constitutions in Europe and America*, translated by C. D. Hazen (New York and London, 1895), p. 251.

ment can repeal Magna Charta or the Habeas Corpus Act by the same process as that by which it provides for building a bridge across the Thames or combating the cattle tick. While this is formally true, it is really misleading; for as a matter of fact no fundamental changes in the great laws recognized as a part of the Constitution can be made without such a prolonged and obstinate opposition that the nation would be fully roused to the importance of the issue."¹⁵

Actually, although Parliament has supreme authority to change the fundamental law at any time by statute, it has exercised the right to make fundamental changes directly affecting the system of government upon relatively few occasions. From 1801 to 1900 there were only three legislative changes which immediately affected the governmental system. These were the three Reform Acts of 1832, 1869 and 1884. During the past thirty years, fundamental changes have taken place much more rapidly. Among them have been two Franchise Acts of 1918 and 1928, the parliamentary Act of 1911 which prevented the House of Lords from passing upon money bills, the Act of 1920 setting up the legislature in northern Ireland, and the Irish treaty of 1924 which recognized the Irish Free State.¹⁶

Although Parliament is supreme, it has become a custom during the present century to dissolve Parliament and hold a new election before passing a fundamental law of very great importance. There are several advantages in such a plan. The people, in an indirect way, have a referendum upon the proposed fundamental law, as they can elect members to the Parliament which is to consider it, according to the views expressed by parties and candidates upon the subject at issue. Thus the legislature remains a unified constituent authority, responsible for the passing of fundamental laws; but at the same time it acts more or less under a mandate of the people.

Since a part of the British Constitution is unwritten, depending on common law, custom, and convention to define it, the

¹⁵ D. D. Wallace, *The Government of England, National, Local, and Imperial* (New York, 1917), pp. 11-12.

¹⁶ Ramsay Muir, *How Britain is Governed* (New York and London, 1930), p. 319.

development of these same factors may and does change it. The custom mentioned in the preceding paragraph is substantially a change in the Constitution. So is the custom, in effect since the time of Queen Anne, according to which the Sovereign signs any bill passed in due form and sent to him for the "royal assent." The general satisfaction with this somewhat vague constitutional situation was expressed by the poet Tennyson, who described England as a land

Where freedom slowly broadens down
From precedent to precedent.

THE UNITED STATES. In the United States, the formal amending process is very interesting. The constitutional article which provides for it reads:

Art. V. The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article: and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

This Article clearly provides four methods of making formal changes in the Constitution of the United States: First, Congress may propose amendments, which become effective when ratified by the legislatures of three-fourths of the States; second, Congress may propose amendments, which become effective when ratified by conventions in three-fourths of the States; third, upon application by the legislatures of two-thirds of the States, Congress shall call a convention for proposing constitu-

tional amendments, which shall become effective when ratified by the legislatures of three-fourths of the States; fourth, amendments proposed by a convention (as under method three) shall become effective when ratified by conventions in three-fourths of the States. Other hypothetical situations, involving any method of amendment mentioned above, plus the consent of some State to be deprived of its equal suffrage in the Senate, may be disregarded as beyond the bounds of probability.

Only two of the methods described above have been used; the first for the first twenty amendments, and the second for the Twenty-first Amendment. It is true that the legislatures of various States, as well as State conventions, have voted in favor of adding certain other amendments to the national Constitution.

The process of amending the Constitution of the United States differs from that of amending other Constitutions of comparable importance, in several notable respects:

1. It is very difficult to amend the Constitution of the United States. In practice, an amendment requires a two-thirds vote of two national legislative bodies, plus a majority vote at least, of seventy-two state legislative bodies.
2. No person or group of persons is made chiefly responsible for amendments, as in England or France. In those countries the legislature is definitely made responsible for the amending process, and the Cabinet is expected to assume leadership and responsibility in the matter.
3. Congress is not a constituent authority. It possesses only a portion of the constituent power. For practical purposes, it merely proposes or suggests amendments.
4. The States as such participate in the amending process. Their legislative organs, or special conventions, rather than the people, ratify the amendments proposed by Congress.
5. The people have no direct part in the amending process, either in proposing amendments, or in passing upon their ratification.

Experience has shown that the amending process in the United States is such as to make changes unlikely, except upon an issue that is primarily emotional. Amendments are practically impossible if they concern administration, governmental relationships, functions, or controls, unless some definite event has aroused popular feeling concerning them. This may seem strange, in view of the fact that popular participation in the amending process does not exist, but it is explained by the difficulty and complexity of the process. Generally only an emotional interest will bring enough pressure to bear on Congress and on the State legislatures, to carry this slow and cumbersome procedure through to a definite end.

Again, the process is amazingly irresponsible. In most modern governments the legislature is the normal constituent authority. The legislature, or at least its more powerful chamber, is elected by the people and is responsible to the people. If the constitution does not fit the needs of the times, the parliamentary branch of government, guided by the Cabinet, yet controlling the Cabinet, is responsible for making changes. The constituent authority is centralized in the legislature, save for special conditions under which it is exercised by the people. In the United States, by painful contrast, the constituent authority is not centralized anywhere. The national Congress shares it with 48 bicameral legislatures in the States (or theoretically, with special conventions in the States, or with a special convention called by Congress at the request of two-thirds of the States). First, one State legislature, then another, perhaps over a long period of years, may be subdued by lobbyists or pressure groups, whose emotional or economic interest persists, until the requisite number of State legislatures have voted favorably upon the measure.

What is the result of making the constituent power so scattered and irresponsible, and the amending process so cumbersome? One serious result is, that important constitutional changes are brought about in other ways than by formal amendment. Although no system could absolutely avoid the influence of these other factors, the system of the United States, as we shall see later, positively encourages it. In particular, it has

encouraged the courts to assume powers which the courts in other countries do not dream of exercising.

A second result is, a growing tendency to place in the Constitution, by way of amendment, positive legislation and police regulations which have no logical place in such an instrument. Because the amending process is so difficult, those who desire certain legislation realize that if they once secure its embodiment in the Constitution its repeal will be very unlikely.

When the constituent authority is so scattered, the legislature cannot be held responsible for unsatisfactory features in the constitution. To take a single example, no democratic European country would tolerate for a month, except possibly in a very grave crisis, a Cabinet which proceeds to do as it is ordered by the Chief of State, regardless of the political situation in the legislature; a Cabinet whose members refuse to appear in the legislative Chambers to answer for their acts; or a Cabinet which refuses to resign at the request of the legislature. The United States tolerates this situation, partly because a constitutional amendment is so difficult, and a question of organization is possessed of so little emotional appeal, that a change is hardly possible. If Congress could amend the Constitution, it could be held responsible for a proper working organization of the governmental structure.

In other countries, the amending process presents a great variety of detail. It is well to examine briefly the method of altering the constitution in several additional countries which have written constitutions, before seeking to draw any general conclusions.

AUSTRALIA. According to the Australian Constitution, a law for its amendment must be passed by an absolute majority of each House of the Parliament; and not less than two months or more than six months after its passage through both houses, the proposed new law must be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

The constitutional article governing amendment reads as follows:

Art. 128. This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

The noteworthy feature of this Article is, that it requires popular participation in the amending process, for every proposed change in the federal Constitution. Normally, both Houses of the legislature will agree upon an amendment before it goes to the people; but a bill to amend, passed twice by either House with an interval of three months between the two votes, may be submitted to the people. The first provision of the Article just quoted seems to preclude any possibility of popular initiation of an amendment.

JAPAN. Proposals to amend the Constitution of Japan are submitted to the Imperial Diet by an Imperial Order. Neither House can open the debates unless two-thirds of the whole number of members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the members present is obtained.¹⁷

SWITZERLAND. The Constitution of Switzerland may be revised entirely or partly at any time. Total revision is made in the manner required for the passage of federal laws. When either Chamber of the Federal Assembly passes a resolution for the total revision of the Constitution, and the other Chamber does not agree, or when 50,000 voters demand a total revision, the question whether the Constitution ought to be revised is submitted to the people, who vote yes or no. If, in either case, a majority of those voting pronounce in the affirmative, an election for both Chambers is held, with the purpose of having the new legislature proceed to the revision.

Partial revision may take place either on popular initiative,

¹⁷ Constitution of Japan, Art. 73.

or in the form established for federal legislation. The initiated demand may take the form either of a proposal in general terms, or of a fully prepared draft. When the initiated demand is expressed in general terms, the federal Chambers, if they approve, proceed to a partial revision in accordance with the terms of the proposal, and submit the project for adoption or rejection to the people and the cantons. If, on the other hand, the Chambers do not approve, the question of the partial revision is submitted to the vote of the people. If the majority of the citizens taking part in the vote pronounce themselves as in favor of the measure, the Federal Assembly proceeds to the revision in conformity with the popular decision. When the demand comes in the form of a fully prepared project, and the Federal Assembly gives its approval, the project is submitted to the people for adoption or rejection. If the Federal Assembly is not in favor of the project, it may draw up another bill, or recommend to the people the rejection of the proposed project, and may submit its own project or its proposal for rejection, to the vote of the people, together with the project resulting from popular initiative. The revised Constitution, or the revised part of the Constitution, becomes valid in any case only when it has been accepted by a majority of the Swiss citizens who take part in the election, and by a majority of the cantons.¹⁸

TURKEY. The Constitution of 1924 of Turkey may be amended in the following manner: the project for revision must be signed by one-third, at least, of the members of the Assembly, and must receive the favorable vote of two-thirds of the members of the Assembly present.¹⁹

SUMMARY. Having examined the amending process in several important countries, a brief summary may be made:

- i. In all the countries examined the legislature is, if not the sole constituent authority, at least an important factor in the changing and amending of the constitution.

¹⁸ Constitution of the Swiss Confederation, Arts. 118-123.

¹⁹ Constitution of Turkey, Art. 102.

a part of the legislative authority,²⁰ it again seems reasonable to invest him with a share in the constituent power.

The question as to the ratification of amendments calls for a somewhat similar reply. Where the constituent authority is not the legislature alone, but consists of the legislature and one or more other authorities, such as the executive, the people, and in case of federations or confederations, of States as well, it is evident that in practice all the various elements of the constituent authority will ratify all formal amendments.

Our next question is, what reasons are advanced for denying to the legislature alone the power of amending the constitution? The reasons given, in states where other authorities share this power, are both theoretical and practical.

The most general statement of the philosophy underlying the institutions of popular initiation and popular ratification of constitutional provisions, is the claim that where sovereignty is recognized as belonging to the people, the most effective way in which it can be exercised is through the making of the fundamental law, especially a law which binds the legislature. Under these circumstances, when the legislature acts in a constituent capacity it is but an agent of the people, merely assisting them in the process of changing their constitution. Even though the legislature may initiate constitutional amendments, it should not have the power of putting them into operation without the consent of the people. To do so, in the words of *The Federalist* (used in another connection), "would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves."²¹

Practical arguments that have been advanced in favor of popular participation in the process of making the constitution are, as a rule, based upon the fear that the legislature acting alone might adopt amendments which would injure the interests of the people or which would be in opposition to the popular will. It is urged in favor of the initiation of constitu-

²⁰ Arts. 5 and 6 of the Constitution provide: "The Emperor exercises the legislative power with the consent of the Imperial Diet. The Emperor gives sanction to laws, and orders them to be promulgated and executed."

²¹ *The Federalist*, No. LXXX.

tional amendments by the people, that although changes in governmental structure, governmental relationships, or governmental functions might be necessary for the general welfare, yet the legislature, because of its selfish interests, its conservatism, its failure to sympathize with the aspirations of the people, or even its subjugation by sinister influences, might fail to initiate these changes; therefore, the people ought to be able to overcome such circumstances by their own power of initiation. Conversely, it is argued that in case the legislature has passed a proposed amendment which may or may not be desired by the people, the latter should be able to give or refuse their ratification. Later, in connection with the discussion of the legislature as the constituent authority, the opposing arguments will be reviewed.

The reasons why in federations and confederations the member States participate in the constituent process, as they do in the United States, Switzerland, Mexico, and Australia, are largely historical and practical. Historically, all these countries were composed of formerly independent States which were jealous of their rights. The States feared that if the central legislature alone could amend the constitution, it might abolish the States, change their boundaries, or take away their powers.

The Legislature as the Constituent Authority

In France, the Chambers sitting together as a National Assembly may amend the constitution. In England, Parliament may pass constitutional laws. The legislature is the sole authority entrusted, in these countries, with formal action upon the Constitution. It must not be forgotten, however, that the legislature of either England or France would certainly ascertain the will of the people before amending the Constitution in any important matter.

Many arguments have been brought forward in favor of making the legislature the sole constituent authority. Perhaps the chief of these is that this practice is a logical consequence of representative government. "The meaning of representative government is," said John Stuart Mill, "that the whole people, or some numerous portion of them, exercise, through

deputies periodically elected by themselves, the ultimate controlling power, which, in every constitution, must reside somewhere." ²² Mill goes on to say that it is necessary for practical purposes that supremacy in the state should reside in the representatives of the people. The people themselves cannot perform the various functions of government; they must of necessity carry out the functions through agents or representatives. The formulation of constitutional amendments is one of the many functions which may logically be performed by the representatives of the people. In order that the people be sovereign, it is not at all necessary that they should control their representatives by sharing in the making of written constitutional law. Their control may take other forms, such as control through the electoral process, or perhaps control through unwritten rules and customary ways of doing things.

The objection is sometimes proffered, as has been seen, that unless the people have a right to initiate constitutional amendments, the legislature, because of its conservatism, its special interest in the *status quo*, or its failure to sympathize with the popular feeling, will not make necessary changes in the constitution. To this the reply may be made that when popular feeling reaches such a state as to demand amendments, there is no doubt that the members of the legislature will either bow to this feeling or will be replaced by those who do.

Those who believe that the legislatures alone should normally have the right to amend the constitution bring forth other practical arguments to supplement the theoretical considerations. The first is the cost of an election. If a special election is held in regard to proposed amendments, the cost is very considerable. Even if the election is held on the same date as a general election, the cost of initiating the petitions, the cost of ballots, and the like, will mean a good deal of additional expense. But this objection might be brushed aside as relatively unimportant, were it not supported by others of a more important nature.

For instance, it is very difficult to decide what constitutes a

²² J. S. Mill, *Considerations on Representative Government* (New York, 1874), p. 97.

fair and just proportion of voters who must sign a petition initiating an amendment or demanding a referendum. If the proportion is set too low, the state may incur a large expense merely to satisfy a few individuals or special interests; if too high, the requisite number of signatures can seldom be secured, and a good deal of money and energy will be wasted from time to time in the vain endeavor to obtain them. It is difficult, also, to devise a proper plan for educating the people as to the constitutional measures on which they may vote. Should some agency of the state supply information, or should the task of presenting the arguments for and against the measure be left entirely to private individuals and the newspapers? Should an initiated amendment always be submitted directly to the voters, or should the legislature, as in Germany, have a chance to vote upon it before submission to the people, and perhaps to obviate the necessity for a popular vote by enacting the measure in regular form? Should the initiated measure, in order to become a part of the constitution, receive a simple majority of all votes cast, or an extraordinary majority of all votes cast, or some specified majority of the votes of all the qualified and registered voters? If initiated measures are voted on at special elections, the vote may be so light that either a minority of the people may amend the constitution, when a specified majority of ballots cast decides the matter; or, if a majority of the registered vote is required, the vote is usually so small as to defeat the measure, since under this system every one who does not go to the polls to all intents and purposes votes negatively on the measure. In case the constitutional measure is voted upon at a general election, there is a great danger that the people will be so much interested in the candidates for office that they will give little thought to the initiated measure. These latter considerations apply equally to measures which are not initiated, but referred to the people under conditions fixed by constitutional or statutory law. The difficulty of solving these and other related problems, as well as the popular lack of interest, has caused many to question the efficiency of this method of popular control, and to advocate constitutional amendment by the legislature.

Those who believe that the amending process should be in the hands of the legislature object, likewise, to having the initiation and referendum upon constitutional measures given to the component States of a federation. They point out that the States may, for purely selfish, sentimental and historical reasons, prevent necessary reforms. This is particularly true in respect to the doing away with antiquated boundaries; the retention of functions by the States, which should logically go to the central government; and the abolishing of institutions and relationships that have lost their significance because of changed economic, social and political conditions. When the national legislature is only partly responsible, and the State legislatures are only partly responsible, for amending the national Constitution, the process of amendment makes for evasion of responsibility on both sides, and for unnecessary wastes of money, energy and time. It has been the experience of the United States that unless the resolution of Congress in respect to a constitutional amendment expressly sets a time limit, the amending process may continue over a long period of years. Such an interval of uncertainty is objectionable for many reasons, chiefly because a valuable amendment may fail to be adopted merely because it is impossible to maintain the necessary interest and exert the influence necessary to carry it through; and because an amendment which is not adopted for many years after it was first proposed may not suit changed conditions.²³

Laws may be to all intents and purposes essential parts of constitutions; and from this point of view, bills passed by legislative bodies are often equivalent to constitutional amendments, whether they are or are not recognized as such. The various acts extending and altering the electoral franchise, passed by the British Parliament during the last century, are recognized

²³ An amendment is not before the States indefinitely. See *Dillon v. Gloss*, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994 (1921). There is nothing in Article V which suggests that an amendment once proposed is to be open to ratification for all time, in that ratification in some of the States may be separated from that in others by many years and yet be effective. Quite the contrary is indicated. Nevertheless, it was about thirteen years after the Sixteenth Amendment was proposed, before it was ratified by enough States to make it effective.

as constitutional laws, changing certain features of the Constitution. In Germany, it was at least implied by court decision that under the Weimar Constitution any law which had been passed by a two-thirds vote of the Reichstag and ratified by a two-thirds vote of the Reichsrat (the procedure required for legislation amending the national Constitution), was equivalent to an amendment.²⁴ In France, although formal revision of the constitutional laws must be made by the National Assembly—that is, the two legislative Chambers meeting as one body—several laws passed in the ordinary form are generally considered as entering into the Constitution, especially the “organic laws” on elections.²⁵

Ordinary legislative acts which are not designed in any sense as constitutional laws or amendments sometimes operate as such; or, to speak more accurately, bring about modifications of the original intent shown by the language of a constitution or by that of the debate which led to the adoption of the various clauses. It cannot be denied that the Congress of the United States has extended the functions of the national government in ways undreamed of by the writers of the Constitution. This country and others, and our member States, have learned by experience that a legislature (with the consent of the courts where judicial review exists) is sure to make constitutional changes which are not openly acknowledged as such, when the original constitution has placed the central government in too weak a position for carrying out its functions, or when functions develop very rapidly, due to pressure of circumstances.

Changing Constitutions by Judicial Decision

Even in countries where judicial review, as such, is not permitted, judicial decisions must alter constitutions to some extent by the mere process of interpreting and applying their provisions. The real power of the courts will depend upon several factors, for example: whether governmental powers

²⁴ See F. F. Blachly and M. E. Oatman, “Judicial Review of Legislative Acts in Germany,” *American Political Science Review* (February, 1927), Vol. XXI, No. 1, pp. 113-119.

²⁵ See F. P. L. Moreau, *Précis élémentaire de droit constitutionnel* (Paris, 1921), 9th ed., pp. 115ff.

are divided between a central government and State governments; whether the legislature itself is the complete constituent authority or only a partial constituent authority; the number of limitations placed in the constitution affecting the legislature; the doctrine that has developed regarding judicial review; and the presence in the constitution of numerous vague phrases, such as due process of law, equal protection of the law, and other expressions which the courts may interpret in such a way as to virtually change the evident meaning of the constitution.

The classic example of this influence may be called the amendment of an amendment—that is, the action of the courts upon the “due process of law” clause in the Fourteenth Amendment to the Constitution of the United States. This amendment, which was intended only for the protection of the newly freed Negroes from State interference with their freedom,²⁶ has become through judicial interpretation a weapon used by the courts to declare acts of State legislatures null and void, on the ground that they deprive persons of life, liberty and property without due process of law, even when they do not concern the Negro in any way. This is but one example of many which might be cited.²⁷

In France, no limitations upon the legislature are found in the Constitution. The Constitution contains neither a Bill of Rights, nor such general phrases as have been mentioned above. It does not make a distribution of powers between the national government and the local governments. The legislature, sitting as a National Assembly, amends the Constitution. For all these reasons, there is little opportunity for the courts to change the Constitution very seriously by interpretation, or by controlling legislation. It is claimed that the legislature has at times to all intent amended the Constitution without the

²⁶ *Slaughter House Cases*, 83 U. S. (16 Wall.) 36, 21 L. Ed. 394 (1873).

²⁷ See F. F. Blachly and M. E. Oatman, “Some Consequences of Judicial Review,” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1929), Vol. I, Pt. I, pp. 500-511; L. B. Boudin, *Government by Judiciary* (New York, 1932), 2 Vols.; T. R. Powell, “The Supreme Court and the Constitution,” *Political Science Quarterly* (September, 1920), Vol. XXXV, No. 3, pp. 411-439; C. G. Haines, *The American Doctrine of Judicial Supremacy* (Berkeley, California, 1932), 2d. ed.; Edouard Lambert, *Le Gouvernement des Juges* (Paris, 1921).

formality of meeting in a National Assembly. Since the courts cannot pass upon the question whether a certain legislative act is or is not in harmony with the Constitution, whether such acts do conflict with or change the instrument is a matter of opinion. If public sentiment objects to the work of the legislature, for this or any other reason, the people can elect a new legislature.

Although the English courts, when interpreting the many acts which today form what are called constitutional laws, may somewhat change their original meaning or intent, yet, since Parliament alone is the constituent authority, if it is dissatisfied with the interpretation given by the courts, it can alter the law to make its own intent clear. In any case, since the courts of Great Britain are not engaged in interpreting limitations upon Parliament, or deciding questions involving distribution of powers between the central authority and subdivisions such as States, they cannot exercise any such degree of control as do the courts in the United States.

Changing Constitutions Through Custom and Obsolescence

Custom and party actions are often responsible for the changing of constitutions. A few examples will suffice. The Constitution of the United States provides that the national President shall be chosen by presidential electors from each State, each of whom shall vote for one person for President and one person for Vice President. The person receiving the greatest number of electoral votes for President, if a majority of the whole number of electors, is to be declared elected to the office of President, and the person receiving the greatest number of votes for Vice President, if a majority, is to be declared elected as Vice President. One need only compare this procedure, purposely made non-partisan, with the present method of the national nominating convention, the vote by the people, and the merely formal action of the present-day electors, to see how far custom and party practice have transformed the Constitution.²⁸

The Constitution of England has been changed by the development of modern political parties, so that the Sovereign is

²⁸ For more complete discussion of this change see Chapter VII.

not free to appoint ministers, or even to surround himself with personal advisers, whose political affiliations are opposed to those of the majority in Parliament. A custom which has almost the force of a constitutional amendment, is that of dissolving Parliament and "going to the country" for an expression of the popular will when a very important bill is under consideration, and there is uncertainty whether the people and the legislature are agreed regarding it.

The Constitution of France has been changed by custom (for reasons that will be given elsewhere) so that several powers bestowed upon the President of the Republic are never exercised, even with the approval and the countersignature of a minister.

One or two examples of the transformation of the German Constitution of 1919 by custom and party practice may be given. The Constitution provides that the national President shall appoint the Chancellor, and, upon the recommendation of the latter, the national ministers. It was evidently the intent of the writers of the Constitution to give the President a certain degree of independence in the choice of the Chancellor, and the Chancellor independence in the choice of the other ministers. Due to the complex party situation, however, the President always found it necessary to consult the leaders of several different parties as to an acceptable Chancellor. The Chancellor, before the time of Hitler, was always handicapped in the selection of the other ministers, since he, like the President, had always to consult the various party leaders. As a consequence, the formation of the Cabinet became a matter of political bargaining.²⁹ Under the single-party system introduced by Hitler, the situation has been transformed; and party bargaining is no longer possible.

The numerous and unpredictable changes in conditions which affect constitutions cannot be classified in any way. Every constitution that endures for any length of time feels their influence. A few random examples may be mentioned. The Fourteenth Amendment to the Constitution of the United States

²⁹ See F. F. Blachly and M. E. Oatman, *The Government and Administration of Germany* (Baltimore, 1928), pp. 103 ff.

is composed of five sections, of which only the first one has any particular significance today. This first section defines citizenship, and sets forth the famous due process of law clause and the equal protection of the laws clause. The second section, which provides for the reduction of representation in Congress of any State which abridges the rights of its citizens to vote, has never been considered seriously, despite the fact that in practice voting privileges have been much abridged by round-about methods in several States. The section which prohibits the holding of certain offices by any person who, having taken an oath as a member of Congress, and so on, shall have engaged in insurrection or rebellion against the United States, and the section dealing with the assumption of debt incurred in aid of insurrection or rebellion against the United States, were measures inserted as the result of the Civil War. The mere lapse of time has made them meaningless.

Events have likewise invalidated, or made of little significance, several provisions of the 1919 German Constitution. Article 107 of this Constitution provides for the establishment of a national administrative court. Such a court has not yet been established, because of fundamental differences of opinion as to its organization, its powers, its jurisdiction, its location, and the like. The district labor councils, the National Labor Council, and even the National Economic Council, all of which are provided for in Article 165 of the German Constitution, have never exercised the influence in governmental activity desired and anticipated by those who labored for the adoption of the Article establishing them. Under the Hitler regime, so many changes have been made in constitutional practice,³⁰ and so many provisions of the Weimar Constitution have been directly violated, that it is hardly possible to decide with any degree of certainty whether Germany is really being governed under this Constitution at present—despite the fact that nearly every law or decree purports to be based upon some one or more of its Articles.

³⁰ See J. K. Pollock and H. J. Heneman, *The Hitler Decrees* (Ann Arbor, 1934), Preface, Introduction, Chs. XV (p. 13), XXXIII to XXXVI (pp. 34 ff.).

CHAPTER VII

GOVERNMENT AND THE ELECTORATE

A. The Democracies

The people of every modern state participate in the government in various ways. They may vote upon the text of a proposed constitution, or of proposed amendments to the constitution in force; they may participate in other legislation by means of the initiative or the referendum; they may elect members of one or more legislative chambers; they may elect the chief executive and other executive officers; they may elect judges or other judicial authorities; they may elect members of conventions or other bodies which either select certain public officers for whom the people do not vote directly, or fulfill some other special kind of public function; they may recall certain officers or dissolve legislative bodies by means of a vote to that effect; they may vote on exceptional matters falling into none of the ordinary categories, which are referred to them either as a result of popular initiative or otherwise—as when it was proposed to confiscate for the public treasury the estates of former German royal personages, or later (1931) to dissolve the Prussian Diet by popular vote; they may choose, through various channels, representatives of the public at large, or of certain interests, to serve on councils and boards which advise the government; and they may hold a large number of positions which are not paid offices in the government, but which aid the work of some public organ, through either direct assistance, advice, or control. Even in Russia, Italy, and present-day Germany, there are certain opportunities for the people—or at least those of the people who are not suspected of “disloyalty” toward the group or party in power—to engage in some of the political activities just named.

The newer constitutions of Europe, as well as the newer State constitutions in the United States, contain many provisions securing to the people these various methods of participating in government. Statutes also institute some of the methods of participation listed above. The nature and the extent of popular participation in government vary a great deal in different countries, and sometimes in comparable subdivisions of the same country.

Popular Participation in the Making of Constitutions

The range of practice in this matter, as regards national and State constitutions and amendments thereto, varies considerably. In Australia the people must be consulted directly; in the United States they are consulted only indirectly as regards amendments to the federal Constitution and directly as regards amendments to State constitutions or the adoption of new State constitutions; in England the people are not consulted on proposed constitutional changes as such, but merely vote for members of a Parliament in which a constitutional question is to be decided; and in present-day Germany the people may or may not be consulted, according to the decision of the Cabinet.

Since an analysis of the making and amending of constitutions in several countries has been made in Chapter VI it remains only to mention certain aspects of popular participation in this process which were not previously emphasized. In several States of our own country, Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and Oregon, constitutional amendments may be initiated by the people.¹ Under the popular initiative, any individual or group of individuals may draft a proposed amendment and by securing the signature of a specified number of qualified voters to a petition

¹ On the subject of the amendment of State constitutions, see W. F. Dodd, *The Revision and Amendment of State Constitutions* (Baltimore, 1910); Charles Borgeaud, *Adoption and Amendment of Constitutions in Europe and America*, translated by C. D. Hazen (New York and London, 1895); W. F. Dodd, *State Government* (New York, 1923); F. F. Blachly and M. E. Oatman, *The Government of Oklahoma* (Oklahoma City, 1926), 2nd ed.; A. N. Holcombe, *State Government in the United States* (New York, 1931) 3rd ed.; *Illinois Constitutional Bulletin*, No. 1, 1920.

to this effect, may have it submitted to a popular vote. If the proposed amendment receives the number of votes required by the constitution, it is declared to be adopted and it becomes a part of the State constitution.

In all the States, the legislature may pass bills proposing amendments to the constitution, but in all the States, except Delaware, an amendment thus passed does not become effective until it has been voted upon by the people. Generally an affirmative majority of the votes cast is sufficient to secure the adoption of the amendment, but in some States a larger vote is necessary.²

The Initiative, Referendum and Recall

Reference was made in the preceding paragraphs to the direct action of the people in the matter of constitutional amendment. In various countries and governmental subdivisions the people possess similar powers in respect to laws. Where the initiative belongs to them, a certain number of voters may sign the draft of a law which they favor; and this measure will become law if it secures the requisite majority of votes when submitted to the people at a regular or special election. Sometimes the legislature may obviate the necessity for election, by itself passing the initiated measure.

The referendum, as its name implies, is a mandatory reference of certain measures to the people for decision. Occasionally the legislative body is required by the constitution, or perhaps by some act of its own, to refer certain types of measures to the people before they become effective as law. The referendum may be ordered by some authority other than the legislature, as the Chief of State or the Cabinet. In Czechoslovakia, for example, if the National Assembly defeats a bill which the Cabinet has proposed, the Cabinet, by a unanimous vote, can order a popular referendum which will decide whether the measure is to become law.³

The idea of the initiative and referendum is not new, but early in the twentieth century these measures were strongly

² See A. W. Bromage, *State Government and Administration in the United States* (New York, 1936), Ch. V.

³ Constitution of June 2, 1927, Art. 125.

advocated by reformers who believed that they would improve government. Most of the post-war constitutions of Europe (and elsewhere) provided for the use of the initiative and the referendum under certain conditions. The history of popular action as to measures initiated and measures referred seems, however, to indicate that the people take little interest in direct legislation.

Much the same story may be told of the recall of public officers, including judges, which has been advocated from time to time, and occasionally made a part of the law of some state. In general, it seems to be recognized that the political motives which must enter in when there is a movement on foot to recall an officer, and the disastrous effect upon all public servants of fear lest the performance of their function should wake enemies who would seek to deprive them of office, make popular recall inadvisable.

Popular Election of Legislative and Executive Officers

Legislatures and sub-legislative or willing bodies are, in most modern countries, elected by the people. This is not true in every country, or of every organ which issues laws or sub-legislative regulations. It is safe to say, however, that the election of at least one legislative chamber by the people is now almost universal.

In the United States both Houses of the national legislature and of State legislatures, as well as city councils and county commissions, are all elected by the people. In England, the House of Commons, the county councils and the city councils are elected. In France the Chamber of Deputies, the general councils of the departments, and the municipal councils, are elected by the people. All these countries and many other European countries have recognized that authorities having legislative or willing powers should consist mainly of representatives elected by the people.

Executive and administrative officers are not so often the direct choice of the people as are legislators. In only a few countries is the Chief of State elected directly by the people. Often, as in Austria, Esthonia, Czechoslovakia, France,

Poland and Turkey, he is selected by the legislature sitting as a National Assembly. In Mexico the people elect the President directly.⁴ In the United States and Finland the President is selected indirectly by the people through presidential electors.⁵

In all these countries, the principal executive authorities, that is, the Cabinet members, are appointed by the Chief of State, who may or may not be bound by the exigencies of parliamentary government. There is no country in which the persons who compose the national Cabinets are elected directly by the people.

In the States of the United States, the governor is universally elected by the people. In most of the States, also, the majority of the other executive officers are elected by the people. In many instances several State boards, commissions and other authorities are elected by the people directly. County commissioners or county boards are generally elected by the people. Other county officers, such as sheriff, treasurer, clerk, coroner, prosecuting attorney, and so on, are often elected likewise.

The cities of the United States generally elect their executive authority; except the cities which have the manager form of government, where the manager is appointed by the commissions.

It will be seen that in the United States the more important executive officers in the States, the counties and the cities are generally elected by the people directly. By contrast, we shall find that in England, France, and Germany, as well as in the majority of other European countries, the principal executive officers in the subordinate governmental units are not the choice of the people.

In the English counties, committees composed of members of the county council carry on the various administrative functions. The principal county officer, the clerk of the county council, is appointed by the council itself. In the city government, the mayor is not, as in the cities of the United States,

⁴Constitution of Mexico, Art. 81.

⁵Constitution of the United States, Art. II, Sec. I, Amendment XII; Constitution of Finland, Art. XXIII.

elected by the people but by the aldermen and councillors sitting together.

The people of France do not elect either the Prefects in the departments or the mayors in the cities. Prefects and sub-prefects are appointed by the central government and mayors are selected by the council of the city or commune.

The People and the Judiciary

Judges are never elected by the people in England, France or Germany. In England they are appointed by the Crown. In France and Germany they are appointed by the national President and Chief of State.

In the United States there are several different methods of selecting judges, notably: appointment by the President of the United States with the consent of the Senate, election by the people, appointment by the governor of a State, and election by a State legislature. Judges of the federal courts are appointed by the President. Judges of State courts are chosen either by the people, by the governor, by the legislature, or by a mixed method. In most of the States the people elect their judges. In five States the judges are appointed by the governor. In two States the judges are selected entirely by the legislature. In Connecticut all judges are chosen by the legislature, except the judges of the probate courts, who are elected. In Florida a mixed system also prevails, in which the judges of the circuit courts and the county criminal courts are appointed by the governor, while the judges of the Supreme Court and the county judges are elected. A mixed system also exists in Maine, where the judges of the Supreme Judicial Court are appointed by the governor and the judges of the probate courts are elected. In New Jersey all judges are appointed by the governor, except the judges of the Court of Common Pleas, who are selected by the legislature. South Carolina and Vermont also have a mixed system.⁶ From this survey it appears that the prevailing method of selecting judges in the States of the United States, is the method of election.

⁶ See W. F. Willoughby, *Principles of Judicial Administration* (Washington, D. C., 1929), pp. 367 ff., showing the methods of selecting judges, prepared by Legislative Reference Division, Library of Congress, 1926.

In Europe generally, all authorities connected with the administration of justice are appointed. This holds true of prosecuting attorneys, court clerks, other court officers and executive officers, the minister of justice or comparable officer, the attorney general, and so on.

In the federal government of the United States all court officers and executive officers, including the court clerks, the Attorney General, and the United States marshals, are appointed. In the State governments, as a rule, quite a different situation exists. In most States the attorney general is not appointed by the governor but is elected. The prosecuting attorneys are usually locally elected officers. The same is true of the coroners.

Popular Participation

The people of the United States as a whole have almost no participation in governmental activity through conventions. It is true that delegates chosen at party conventions in some of the States attend the national party conventions and, together with delegates chosen by other methods, assist in the nomination of candidates for the national Presidency and Vice Presidency, but both parties and conventions lie outside the realm of formal government. It is also true that Congress has the power, upon the application of the legislatures of two-thirds of the States, to call a convention for proposing amendments to the Constitution of the United States. Such a convention, however, has never been called. Amendments proposed either by Congress or by a convention of the kind just mentioned are validly adopted "when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress." The second named method of ratification has been employed but once.⁷

In the States the situation is somewhat different. Most of the State constitutions contain express provisions regarding the assembling of State constitutional conventions. Most of them also provide that the question of calling such a convention

⁷ Constitution of the United States, Art. V.

shall be submitted to the voters. Other States require the calling of a constitutional convention at regular intervals.⁸

England makes no provision of any sort for conventions in her governmental structure. She holds no conventions in respect to the Constitution or in respect to laws. The different parties hold conventions, but these are extra-governmental.

In France an elected body of 750 members, known as the National Assembly, framed the present constitutional laws governing France. This body was not elected as a constitutional convention, but as a legislative body. The constitutional laws make no provisions for the use of popular conventions nor are these employed for any purpose.

Recall and Dissolution

In the United States no provision is made in the national Constitution for the "recall"—that is, unseating by popular vote—of any officers whatsoever. Several of the component States have adopted some sort of provisions regarding the recall of officers. Thus, in Oregon, Nevada, Kansas and North Dakota, every public officer may be recalled by popular vote; in California, Arizona, and Colorado, the recall may be used to unseat all elected officers; in Washington, Michigan and Louisiana, all public officers except judges may be recalled.

In Switzerland some form of recall has existed from about the middle of the past century. It was at that time applied to the Great Council or the government or both. The recall for federal officers in Switzerland seems to have become a thing of the past. Several cantons, however, still provide for the recall.⁹

In many of the newer European constitutions there are procedures for the dissolution of Parliament, for the settling of contests between Parliament and the Chief of State, and even for the dismissal of the Chief of State, all by means of the popular vote. Provision is frequently made for the "referendum" on laws. Since many new constitutions are based upon

⁸ See Dodd, *The Revision and Amendment of State Constitutions*, and *State Government*, p. 112.

⁹ See R. C. Brooks, *Government and Politics of Switzerland* (Yonkers, New York, 1920), pp. 321 ff.

the supremacy of the legislative power (for the great majority of them set up the parliamentary system), the referendum may become a procedure for the purpose of regulating conflicts between the government and the legislative bodies, or between the legislature and the Chief of State. When the people vote upon a particular law, they may at the same time resolve a conflict between the government and Parliament. The referendums may thus have a mixed character. The people may be required not only to solve the problem of the adoption or rejection of a measure, but also to decide upon the victory or defeat of the agency supporting the measure.¹⁰

In England the people have no power to dissolve Parliament by means of the initiative and referendum. The effects of byelections which fill vacant seats with members of parties opposed to the government in power, of the definite defeat of a government measure, and of changes in public sentiment, as well as the desire to "go to the country" on an important problem before it is decided by Parliament, cause the Cabinet to advise the dissolution of most Parliaments before the end of their term. Dissolution is always pronounced by the Crown on the advice of the government. The people can never bring it about directly.

The Plebiscite

When particular matters of great importance are to be decided, the voters may be asked to register their opinion by means of a special election. Such an expression of popular opinion is called a *plebiscite*. The plebiscite differs from the referendum in that it is an exceptional procedure, whereas the referendum is a regularly established part of the legislative process under specific conditions. Important plebiscites that may be mentioned as examples are: several plebiscites taken under the auspices of the Constituent Assembly in France, to decide questions of territorial annexation; the plebiscite which upheld Louis Napoleon in the *coup d'état* which placed him on the throne of France as Napoleon III; the plebiscite of January

¹⁰ B. Mirkine-Guetzevitch, "Les Nouvelles Tendances du Droit Constitutionnel," *Revue du droit public* (1930), Tome XLVII, No. I, pp. 35-81.

13, 1935, which resulted in the reunion of the Saar region with Germany; and the plebiscite which supported Hitler and his Cabinet in the matter of Germany's withdrawal from the League of Nations.

Participation of the People in Government in Advisory Capacities

The complexity of modern problems, and the great number of interests involved, have made it almost impossible for either the legislature or the administration to handle many of these problems adequately without a good deal of advice from persons or organizations that are particularly concerned, or have special knowledge, or represent the public interest. This advisory function is sometimes carried out casually, so to speak, when administrative or legislative officers who desire light on a given subject ask advice and information from persons or organizations who are for some reason capable of supplying them. Again, it is carried out systematically when laws or ordinances provide for the formation of consultative and advisory agencies of various kinds. Quite often advisory bodies which have especial expert knowledge are attached to ministries, departments, or institutions, for the purpose of furnishing the necessary facts and advice. The names of these organizations differ, but as a rule they are called commissions, councils, and the like. Their special significance lies in the fact that their members are not officers of the government, but citizens called to advise the government. Frequently also, mixed committees are established, in which public officers and members of the general public work together. Only a few examples of such bodies can be given. In Germany we may select almost at random the Technical Commission for Sea Navigation, the Expert Committees for the Technical Education of Seamen, and the Stock Exchange Committee, all of which are associated with the Ministry of Economics.

In France there exist such organizations as the Superior Air Transportation Council and the Consultative Committee on the Technical Exploitation of Air Transport; and, connected with the Ministry of Public Instruction and Fine Arts, the Superior

Council on Public Instruction and the Consultative Committee on Public Instruction. Nearly every French Ministry has the advice and assistance of several commissions, committees, or councils which are at least in part extra-governmental. Perhaps the use of such agencies has gone further in France than in any other country.

Until quite recently, there have been comparatively few lay advisory boards, commissions, or councils connected with the national departments in the United States. There are, however, certain authorities which act in a technical planning and advisory capacity, such as the Advisory Committee of the Federal Oil Conservation Board, the National Advisory Committee for Aeronautics, the Commission of Fine Arts, and the Advisory Council of the National Arboretum. Temporary councils or commissions for the investigation of certain problems or for the purpose of furnishing advice are quite often established, such as the Wickersham Crime Commission and the President's Conference on Unemployment. During the last few years the practice of consulting lay advisors has grown with amazing rapidity. It is probable that the use of such agencies will be considerably extended in the future, as the complexity of social life shows no signs of lessening, and the pressure upon governmental agencies for solutions grows ever heavier.

Advisory Councils

In many countries today provision is made for the organization of advisory councils¹¹ in a number of different fields. The powers of these councils vary. In some instances a council may do little else than report its views to the appropriate administrative division or legislative committee; in other cases it may demand the introduction of bills into the legislature, or may have some sort of veto power affecting bills within its own sphere of activity. The purpose of establishing such councils is to provide the government with expert advice upon important matters, and to provide the people interested in each special

¹¹ See A. W. Macmahon, "Boards, Advisory," *Encyclopaedia of the Social Sciences* (New York, 1930-1935), Vol. II, pp. 609-611.

field with an organ which gives informed consideration to the desires and opinions expressed by them, and which acts to some extent as a means of keeping the government abreast of popular opinion.

The advisory council is most useful when it fulfills the purposes named. By contrast, it is least useful when controlled by groups whose interests are not those of the people at large. Councils which deal with matters scholastic or scientific in nature—as, for example, a council of able jurists which gives advice upon the codification of a body of law—are more likely to succeed in representing the general body of opinion concerned, than councils which deal with controversial political and economic questions.

Summary and Conclusions

There can be little doubt that the people in modern democratic states possess the right to participate in the various operations and activities of government to a far greater extent today than they did a century ago. Generally speaking, the legislature is elected by the people. Except in the United States, however, there has been little attempt to elect persons to fill executive and administrative positions.

There has been great development, whether for good or for ill, in the right of the people to participate in constitutional changes, and to exercise the powers of initiative and referendum in respect to laws. To a less extent, there has been an increase in popular power to settle differences between the executive and the legislature. Several of the newer constitutions provide for the dissolution of the legislature or the recall of the executive by popular vote. There has also been a considerable increase in popular participation in government in an advisory capacity.

In the United States there is a noticeable difference between the national and the State governments as regards popular participation. The national government has not adopted the initiative, the referendum or the recall, as many States have done. It does not have direct popular election of the President (at least not in law; but in fact, the President is elected by the peo-

ple through their choice of State electors). The people do not, as in the States, participate directly in the amendment of the Constitution. They do not elect any administrative or judicial officers, as is the custom in the States. In fact, the national government and the State governments seem to be based on different philosophies in respect to popular control. The reasons for these differences are partly historical. On the whole, there has been less dissatisfaction with the national government than with the State governments; and less demand, accordingly, for direct popular control. Probably it has been evident, also, that such devices as the initiative, the referendum, and the recall would be difficult to apply in national affairs because of the forty-eight campaigns needed and the sheer size of the whole undertaking.

There may be a deeper reason than any of these. Direct control over legislation by the people has been a great disappointment to many who looked to it a few decades ago as a cure for all the ills of the body politic. The initiative and the referendum have not produced any important results except such as could have been obtained with less trouble and less cost, by the careful choice of the representatives composing legislative bodies.

The democratic states are not at present displaying any tendencies to provide for direct popular action on a scale that might destroy representative government. The legislatures are still, in nearly all countries, the agencies which ratify the plans of the administrators and which adopt important new policies. The people in general do not wish to undertake the burden of carrying on government directly, in any of its branches; but they do desire, and are increasingly obtaining, sufficient powers of intervention and participation to assure the satisfactory conduct of public work. In some fields, popular participation is highly to be commended. Certainly the advisory council may be very useful; and the popular election of legislators is the very heart of modern free government, which must be retained in some form even though it is occasionally abused. In other fields, the case is quite different. The popular election and recall of judges is a blow at that independence of the judiciary

which is indispensable to the proper administration of justice. Each type of participation must be judged by its results.

B. The Totalitarian States

RUSSIA

The Party in Russia

The Communist Party is the only political party which may legally exist in Russia. Although it does not claim to be identified with the state, all important central offices in Russia and the U.S.S.R. are held by its members, and its power and influence are felt universally.¹²

Party Organization

The organization of the Communist Party is outlined in its constitution.¹³ A territorial basis is adopted, and the party organization of any territorial unit is supreme as regards party organization affecting only a part of said unit.

The lowest unit of organization in the party is the "cell," which is formed in villages, institutions, factories, Red Army units, and so on. A cell must include at least three party members, and must be authorized by a circuit, county, or economic district committee. In a large factory or other enterprise, sectional cells may exist in the general cell.

The work of the cell is: To carry the party slogans and decisions to the masses; to recruit and educate new members; to assist local party committees in their work of organization and propaganda; and to participate actively as a party organ in the economic and political life of the county.

Local decisions are made by general meetings of the cell. These decisions, orders from higher party organizations, and

¹² Under the 1936 Constitution of the U.S.S.R. in the Article insuring to citizens "the right of union into public organizations," the All-Union Communist Party is mentioned as—"the directing kernel of all organizations of toilers, both public and State." (Article 126.)

¹³ Constitution of the All-Union Communist Party, translated by Jerome Davis, *Current History* (February, 1927), Vol. XXV, No. 5, pp. 713-721. Also found in N. C. Hill and H. W. Stoke, *The Background of European Governments* (New York, 1935), pp. 541-547.

current duties in general, are carried out by a "bureau" elected by the cell every six months.

The rural township party organization has as its "supreme organ" a general meeting of party members in the township. Such meetings are held each month. Among their functions are: The election of delegates to county and other party conferences; election of an executive committee; and discussion and ratification of the committee's reports.

The executive committee directs the work of all party organizations in the township. It organizes new cells and presents them to the county committee for ratification, supervises the party treasury, and reports each month to the county committee.

The county conference is composed of delegates elected by the township meeting. The conference hears and ratifies the reports of its own committees, and discusses questions affecting the party, Soviet, economic and trade union activity of the county. It elects a committee, a revision commission (an auditing and supervising board), and delegates to the provincial conference.

The county committee ratifies township and precinct organizations, and cells formed in the county; subject to approval by the provincial committee. It organizes various party institutions in the county and directs their activities; it calls conferences of representatives of township cells and it superintends the county treasury of the party. The county committee, with the permission of the provincial committee, may publish party literature and a party paper. Another function of the county committee is direction of the work of various organizations in the county, such as trade unions and cooperatives, and of the Komsomol or Communist youth organization.

The province is served by a provincial party conference, composed of delegates from the county and equivalent party organizations. The provincial conference hears and ratifies reports of the provincial committee, the provincial control commission, the revision commission, and so on. It discusses questions affecting the party, Soviet, economic and trade union

work in the given province. It elects the provincial committee, the provincial control and revision commissions, and delegates to the All-Union Congress of the party.

The provincial committee meets at least once a month. It appoints a bureau of at least five persons to care for current work. The provincial committee confirms the county and precinct organizations in its own area, with the sanction of a higher committee; organizes various party institutions and directs their activities; appoints the editor of the provincial party organ working under its control; organizes enterprises of provincial scope; distributes within the province the personnel and the financial resources of the party; and takes charge of the provincial party treasury.

Through party sections or "fractions," the provincial committee directs the activity of Soviets, trade unions, cooperatives, and other organizations. It also directs the work of the youth organization.

Reports are sent by the provincial committee to the central committee. Informational reports are sent by the provincial committee to general meetings or conferences of city or county organizations. Special meetings or provincial conferences of the representatives of county committees and precinct committees are also called by the provincial committee.

Autonomous republics and regions stand on an equality with provinces. They may form national or regional party units, with national congresses or regional conferences, and the appropriate committees and executive bureaus. They elect delegates to the All-Union Congress of the Communist Party.

The All-Union Congress is composed of delegates from the regions, provinces, republics, and so on, which compose the Union of Soviet Socialist Republics. The Congress hears and ratifies the reports of its committees and other organs; reviews and revises the program and rules of the party; determines the tactical line of the party in regard to current questions; elects a Central Committee, a Central Control Commission, a Central Revision Commission, and so on.

The Central Committee is in charge of party work during the intervals between Congresses. This committee directs all

party activities; represents the party in various relations; organizes party institutions and directs their activities; appoints the editors of the central party organs which are under its control; confirms the editors of party organs of large local organizations; organizes and conducts enterprises of public importance; distributes the personnel and finances of the party, and supervises the central treasury. Through the various party sections, it directs the work of central Soviet and public organizations. Once during the interval between Congresses, the Central Committee calls an All-Union conference of representatives of local party organizations.

The Central Revision Committee checks up: the speed and proper procedure of handling matters in the central party organs, and the proper organization of the apparatus of the Secretariat of the All-Russian Central Committee of the Communist Party; and the treasury and the operations of the Central Committee of the All-Union Communist Party.

Instead of the single bureau or Presidium elected by the executive committees of party organizations lower in the scale, the Central Committee elects: a political bureau for definitely political work; and an organization bureau for the general administration of functions connected with party organizations and a secretariat.

✓ The political bureau (Politburo) is the real directing head of the party under the dictatorship of Joseph Stalin. It contains about ten members including the highest officials of the U.S.S.R. Stalin has been a member since 1922. Here originate all the important high policies of the state, such as the Five-Year Plan. Approval of Politburo decisions by the Central Committee has not always been automatic but with the crushing of the "Trotskyist" opposition, Stalin appears to have secured an almost automatic acceptance of his political plans.¹⁴

The general picture given above is incomplete, since on almost every level there is more than one type of organization.

¹⁴ See Sidney and Beatrice Webb, *Soviet Communism: A New Civilization?* (New York and London, 1935), Vol. I, pp. 366-370. See also despatch by Harold Denny, "Stalin's Authority Firmer than Ever," *New York Times*, November 1, 1936.

This is due to the complexities of the present governmental structure and economic relationships. But the general plan is clear: A base of small "cells" which are combined in township or similar conferences; higher conferences composed of delegates from lower ones; and the All-Union Congress as the supreme party organ. It is clear, also, that each conference or Congress acts between its meetings by means of an executive committee. A bureau or Presidium (the agency which actually carries out the work, keeps the records, and so on) is found in every party organization from the cell up. In the All-Union Congress it is necessary to have several agencies instead of a single bureau.

Membership in the party is limited to persons who subscribe to the party program, work in one of the party organizations, submit to party decisions, and pay membership dues. It is far from certain, however, that an individual who declares himself willing to fulfill the above requirements will be admitted to party membership. New members have to meet difficult conditions. In the first place, they must enter upon a period of probation, and must pass "a course in political grammar"—that is, the basic political concepts of the Communist Party in relation to the government.

In the second place, they must show that they belong in one of three categories: (1) Workers and red army soldiers who come from the workers and peasant classes, including (a) industrial workers who are permanently engaged in physical hired labor, (b) and non-industrial workers, soldiers from the workers and peasant classes, and hired agricultural laborers; (2) peasants other than soldiers, private handicraft workers who are not exploiting another's labor; (3) all others—that is, "white collar" workers, technical experts, members of the learned professions, and so on.

Next, they must be recommended by party members. A gradation of requirements ranges from two recommendations by party members of one year's standing, for "Industrial workers permanently engaged in physical hired labor," to five recommendations by party members of five years' standing, for such persons as office employees, professional men, and

the like. This means that the party is anxious to exclude all persons of "bourgeois" sympathies. Recommendations are not easy to obtain, since those who give them are responsible. In case they recommend "unworthy" persons they are subject to party discipline, even to dismissal from the party.

When a person has met all the above requirements, the question of his admission to the party is discussed first by the cell which he wishes to join, then by a general meeting. If the results here are favorable, the admission may be ratified by a party committee. A circuit or provincial committee must act on all applications except those of "workers, and red army soldiers who come from the workers and peasant classes," who may be admitted upon ratification by the economic district or county committee.

Young persons under twenty years of age (except red army soldiers) are admitted to the party only through the Communist youth organization, or Komsomol. For admission in this manner, the recommendation of a committee of the Komsomol is equal to that of one party member—except for persons in the last category of applicants.

By thus making it difficult to join the party, and by a severe party discipline that includes occasional wholesale expulsion or "purges," the Communist leaders are able to obtain a very large percentage of active and useful members.¹⁵ The training given in the various youth organizations is an apprenticeship in activities of a type favored by the party. Children between eight and ten years of age are enrolled in the Octobrists; children from ten to sixteen join the Pioneers; young persons from sixteen to twenty-three compose the Komsomol. All these organizations, especially the last-named, emphasize the value of Communist doctrines, and seek to develop their members in every way—not only politically, but in mind, in body, and in

¹⁵ The recent trials of "Trotskyist conspirators" resulted in a number of such "purges" and mass expulsions. That these have tended to go too far is indicated by the action of high party officials in reprimanding local committees and requiring that they reinstate many members expelled for frivolous reasons. *Pravda*, the party organ, claims that purges have reduced party membership from a one-time high of about 4,000,000 members and candidates to a present membership of only about 2,000,000. See A. P. dispatch, "Party Expulsions Halted by Moscow," *New York Times*, March 14, 1937.

"proletarian culture." The young persons who compose them are conscious heirs of a Communistically designed future.¹⁶

Functions of the Party

The party in the state assumes the function of guidance and direction. It seeks to control all sorts of economic enterprises, and every important agency of government. Although in the local Soviets there is generally a majority of non-members, it is nearly always the party members who are sent as deputies to higher Soviets. By a sort of progressive selection, the personnel of the All-Russian Congress of Soviets is overwhelmingly Communist. This was also true of the All-Union Congress and will doubtless also be the case with the new Supreme Soviet of the U.S.S.R. This means that in all important matters, which are decided by or directed from the central agencies of government, the Communist viewpoint will prevail. Even in local affairs, there is likely to be relatively little opposition, since the party members of local Soviets or economic groups are quite likely to take the attitude that any who differ from them are "class traitors"—a reputation which few are bold enough to risk.

A consultative committee, consisting of representatives of state, party, cooperative, and other interests, was authorized some time ago. By this and other means, the R.K.I. (Commissariat of Workers' and Peasants' Inspection) acts both for the improvement of public administration, and for the application of the principles of the Communist Party.

The Commission of Soviet Control, established in 1934, is a body of sixty members of the Communist Party, nominated by the party's Central Committee. It acts as a liaison between party and state, and its chairman is a member of the Sovnarkom (Council of People's Commissars) of the U.S.S.R. This body replaced the Workers' and Peasants' Inspection and has

¹⁶ Examples of Komsomol activities include everything from a movement to induce members to become trained aviators (see speech by A. V. Kosarieff, reported in the *New York Times*, April 12, 1936) to a suggestion made in *Pravda* that the "religious center" in the Bashkir Autonomous Republic be transformed into a health resort. (See A. P. dispatch in *New York Times*, December 19, 1936.)

similar functions. It sees that the laws and decrees of the Central Executive Committee and Sovnarkom are carried out everywhere in the Union. It also acts in close harmony with the Commission of Party Control of the Communist Party which has disciplinary functions over party members. By maintaining a staff of inspectors and accountants throughout the Union it acts both for the improvement of public administration and to insure rigid adherence to the party "line."¹⁷

Suffrage

The suffrage in the U.S.S.R. is exercised under the 1936 Constitution by all citizens who have attained the age of eighteen years. Open and oral voting has been replaced by the secret ballot. The formerly disfranchised classes (those who had fought against the Red armies, clergymen, and others) are now enfranchised, and the distinction which gave a rural voter less voice than an urban voter in the choice of the higher Soviets has also been abolished. Although any legal association may present candidates for office, it is evident that the new Constitution contemplates the continued paramount influence of the Communist Party.¹⁸ The recall of elected officials is provided for by majority vote of the electors.

The Constitution of the U.S.S.R. and those of the Union Republics can only be understood as working instruments of government if the constitution and actual operations of the Communist Party are also understood.

ITALY

Organization of the National Fascist Party.

The National Fascist Party¹⁹ is both a political party and a civic militia, under the orders of the Duce, in the service of the Fascist state. It is composed of individual Fascist Squadrons (*Fasci di Combattimento*) which are grouped into provincial federations, and if necessary, into regional groups or

¹⁷ See Webb and Webb, *op. cit.*, Vol. p. 99.

¹⁸ Constitution of the U.S.S.R., Ch. XI, Arts. 134-142.

¹⁹ For "Statute" of the party, as amended in 1929, see *Corriere della Sera*, December 22, 1929.

sub-sections. Each provincial capital has a University Fascist group.

Every Fascist Squadron is expected to attach to itself a woman's Fascist unit. The squadron also supervises the organizations for boys and the woman's unit supervises those for girls.²⁰

There are attached to each provincial federation of Fascist squadrons, the provincial associations of: Schools, Public Employment, Railways, Posts and Telegraphs, Employees of State Industrial Enterprises, and the Section of District Physicians belonging to the Association of Public Employment.

Fascists must wear the badge of the National Fascist Party; but the Fascist Uniform, the black shirt, is worn only on prescribed occasions.

The formal organization of the Fascist Party is headed by the Duce. The party activities are carried out under the guidance of the Duce and in accordance with directions outlined by the group council.

The hierarchy of party officers, under the Duce, is as follows:

1. The secretary of the National Fascist Party.
2. The members of the National Directorate of the Party, and the President of the Association of Families of the Fascists Fallen and the Fascists Wounded or Disabled for the National Cause.
3. The Federal Secretary and the Federal Commander of the Young Fascists; and the Vice-secretary of the University Fascist Organizations.
4. The members of the Federal Directorates; the Secretaries of University Fascist groups; the Second in Command of the Young Fascists; the Regional Inspectors; the Administrators of the Association of Families of the Fascists Fallen and the Fascists Wounded or Disabled for the National Cause; the Provincial Administrators of the Woman's Fascist group.

²⁰ Boys of 8-14 enter the *Ballila*; those of 14-18 the *Avanguardisti*; girls of 8-14 enter the *Piccole Italiane*; those of 14-18 the *Giovani Italiane*.

5. The Secretaries of the Fascist groups; the members of the Directorate of the Fascist groups; the Administrators of the Regional groups; the members of the Directorate of the University Fascist groups; the Commanders of the Young Fascists; the Administrators of the Sub-Sections; the Administrators of the University Fascist Nuclei; the Secretaries of the Women's Fascist groups.

The councils or "collegiate" organs which make general decisions are:

1. The National Directorate of the National Fascist Party.
2. The National Council of the National Fascist Party.
3. The Directorate of Federations of Fascist groups.
4. The Directorate of Fascist groups.
5. The Board of Regional groups.
6. The Directorate of University Fascist groups.
7. The Board of the Sub-sections.

In addition to these officers and agencies, the Fascist Grand Council should be mentioned. This Council is made by law an organ of the state. It acts in certain ways as a liaison agency between state and party. One of its important duties, as will be seen later, is the preparation of a list of candidates for election to the Chamber of Deputies.

The central organisation of the National Fascist Party, under the Duce, consists of a National Directorate, a National Council and a General Meeting.

The presiding officer of the National Directorate is the Secretary of the National Fascist Party. The Secretary is appointed and dismissed by the King of Italy, at the request of the Duce.

Many important "key" positions are held by the party secretary. For example, he is a member of the Fascist Grand Council and is also its secretary; he may be called to take part in the Council of Ministers; he is a member of the Supreme Council of Defence, the National Council of Corporations, the Central Corporative Committee, and other important agencies;

he is President of the Administrative Commission of National Employment Bureaus, Secretary of the University Fascist Groups, Commander of the Young Fascists—and so on.

The Secretary of the National Fascist Party also gives instructions, based on the general decisions of the Grand Fascist Council, regarding the work of the various groups and organizations which are members of the party or affiliated with it. He appoints various party officers, such as the secretaries of the University Fascist Groups, and the Administrators of the Women's Fasci.

The other members of the National Directorate of the party are appointed and removed by the Duce at the request of the Secretary. Some of these members are Vice-secretaries, who act as substitutes for the Secretary in case of need. The Vice-secretaries are members of the Grand Council of Fascism and of the National Council of Corporations, and are vice-commanders of the Young Fascists.

The National Directorate meets at least once a month. Representatives of the Department of the Interior, the militia, and the Ministry for Corporations are present at its meetings.

The National Council is composed of the Federal Secretaries who are in charge of party affairs in the provinces. Its presiding officer is the Secretary of the National Fascist Party. The duties of the National Council are, to examine the activities of the party, and to receive general instructions for execution.

In the provinces, the work of the Fascist Party is headed by Federal Secretaries. These officers are appointed and removed by the Duce, on the proposal of the Secretary of the National Fascist Party. They carry out the orders which are given them by the National Secretary. Each Federal Secretary develops and controls the work of all Fascist Squadrons in his province, and exercises political control over all institutions and organizations connected with the Fascist regime.

The specific duties of a Federal Secretary are manifold. For example, he must keep in touch with members of the Senate; he presides over the Intersyndical Committee; he convenes the Federal Directorate at least once a month; he calls together annually the Secretaries of the Fascist Squadrons, for

consultation and discussion concerning problems facing the Squadrons, and the political, moral, and economic problems of the province. He is Federal Commandant of the Young Fascists in the province, and Political Secretary of the Fascist Squadrons in the provincial capital. He may appoint Regional Inspectors to assist him.

The Federal Directorate is a provincial consultative body. Its members are appointed, at the suggestion of the Federal Secretary, by the Secretary of the National Fascist Party. The Federal Secretary may entrust to each member special duties concerning the various branches of party activities, and the activities of affiliated organizations.

The local party activities are carried on by means of a Political Secretary and a Directorate of the Fascist Squadrons. The Political Secretary, and the leaders of groups and subsections, are required "to know the political and moral antecedents as well as the means of subsistence of each member, and to insist that even in everyday matters the Fascist spirit and discipline shall be respected."

The Fascist Levy takes place on Labor Day, April 21. It consists of the promotion of Young Fascists into the Fascist Party and the Fascist Militia, the promotion of *Ballila* to the ranks of *Avanguardisti*, and the promotion of *Avanguardisti* into the Young Fascists. The *Ballila* are boys up to fourteen years of age; the *Avanguardisti* are youths from fifteen to eighteen. When the latter enter the Fascist Party, they take the following oath:

In the name of God and of Italy I swear to carry out without discussion the orders of the Duce, and to serve the cause of the Fascist Revolution with all my powers and if necessary with my life.²¹

The people take very little direct part in government. In 1927 the Fascist Grand Council worked out a system for changing the representation in the Chamber of Deputies, and

²¹ For English material on the Fascist Party see Herman Finer, *Mussolini's Italy* (New York, 1935); William Elwin (pseud.), *Fascism at Work* (London, 1934); R. L. Buell (ed.), *New Governments in Europe* (New York, 1934); H. R. Spencer, *Government and Politics of Italy* (Yonkers, New York, 1932).

the method of election. This system was embodied into law in 1928. Under the new plan, the Grand Council makes a list of 400 candidates, largely chosen from a list of 800 names presented by the national confederations of Fascist unions and syndicates, and 200 names presented by other organizations. However, the Council is not restricted to these names.

The popular vote is a mere "Yes" or "No" to the question: "Do you approve the list of Deputies nominated by the Fascist Grand Council?" Since no party opposition is permitted, and since Mussolini makes no attempt to conceal his intention to use force if necessary for the preservation of the Fascist regime, the elections held so far under the new system have been complete victories for the Fascist Party. The full power of modern propaganda methods through press, radio, and posters is employed to secure as nearly as possible the picture of unanimous popular support. Since Mussolini has announced the abolition of the Chamber of Deputies, even the slight appearance of popular participation in the government which has been preserved hitherto is doomed.

The fact that a very large number of Italians belong to the Fascist Party gives them no voice in policy-making. As indicated above, the party hierarchy is highly centralized and autocratic. The ordinary party members must obey their immediate superiors, who are not chosen by them but appointed from above. These superiors in turn are responsible to and removable by their superior officers. All power resides in the Duce acting in concert with the Grand Council. The Duce has been able, so far, to dominate this body and by frequent changes in its personnel to prevent the undue eminence of any members who might possibly become the nucleus of an opposition.

GERMANY

In an address to the Commissioners of the Reich, Hitler said: "The political parties have been abolished finally. . . . We must now eliminate the last remnants of democracy. . . . The Party has now become the State."²²

²² Speech of July 6, 1933, translated in J. K. Pollock and H. J. Heneman, *The Hitler Decrees* (Ann Arbor, 1934), pp. 76 ff.

The remarkable words just quoted are not mere extravagance of political oratory. Not only does the law make it impossible for any other political party than the National Socialist German Workers' Party to exist (at least, openly) in Germany today, but changes of a constitutional character, changes in the personnel occupying positions in the public service, and practical changes in government and administration, have made the National Socialist Party, for working purposes, almost identical with the state.

Legal Status of the National Socialist Party

The law is slightly more modest than Hitler in referring to the party, since it merely declares that: "The National Socialist German Workers' Party has become the carrier of the German conception of the state and is inseparably connected with the state."²³

The National Socialist Party is made a corporation of public law, with a constitution established by *der Führer*. In order to obtain the closest cooperation between the members of the party and public officers, a party member, appointed by the Leader as his representative, is in the National Cabinet.

Members of the National Socialist Party and of the Storm Troops and affiliated or subordinate organizations have particular duties toward the Leader, the people, and the state. Any who violate or neglect such duties may be disciplined by special party or Storm Troop authorities. Violation or neglect of duty is any action or neglect which attacks or endangers the stability, organization, activity, or authority of the National Socialist Party; in case of the Storm Troops, it includes any offense against discipline and order. In addition to the regular disciplinary measures, the penalties of arrest and imprisonment may be employed. The public authorities are required to give such assistance as lies in their power to the disciplinary agents of the party and the Storm Troops.

The law²⁴ goes so far as to protect the party, its members,

²³ Law of December 1, 1933, *Reichs-Gesetzblatt*, Teil I, p. 1016; amended by law of July 3, 1934, *Reichs-Gesetzblatt*, Teil I, p. 529.

²⁴ Law of December 20, 1934, *Reichs-Gesetzblatt*, Teil I, p. 1269.

and its leaders by such provisions as the following: Serious attempts to injure the welfare of the Reich, or the influence of the National Cabinet, or that of the National Socialist German Workers' Party or of its members, may be punished by imprisonment, under conditions further specified, for periods up to two years. Offensive remarks concerning "leading personages of the State or the National Socialist German Workers' Party," or concerning their orders or the arrangements made by them, if likely to "undermine the confidence of the people in the political leadership," may be punished by imprisonment. This provision applies to such remarks when made in public, or in circumstances which lead to publicity. Insults to the party uniform, and the unwarranted possession or sale of party uniforms and insignia, are also penalized.

Party Organization

The National Socialist Party is organized primarily on a territorial basis; but, like the Communist Party, it enters into economic, cultural, and other enterprises in order to extend its influence and strengthen its status. The territorial organization is: Local, county, district, national. The party organization on each of these levels, except the last, is subject to higher authority.

Member Groups. Member groups include the Storm Troops and the Shock Troops, the National Socialist Physical Training Corps, the Hitler Youth (divided into several groups with special names), the National Socialist German Students' Union, and the National Socialist Women's League.

Affiliated Groups. The vast majority of Germany's professional associations and other important organizations of nearly every type are affiliated with the National Socialist Party. The most prominent examples of organizations which have retained their independence are the religious associations. Nearly all other organizations of any size and influence have been compelled to choose between affiliation with the party, or their own destruction, followed by replacement with more tractable bodies to operate in the same fields.

Affiliation is made organic by a simple but effective device. Every affiliated body is placed under the appropriate ministry or national agency, and its leader is made a national officer. "For example, the national governor of the National Union of German Civil Servants is at the same time the director of the Civil Service Administration established in the national government; and the director of the Office of Education is likewise the head of the National Socialist Teachers' Association. The structure of the organizations generally follows the political structure of the Party. The leaders of the district, county or local groups of the associations are active in similar positions in the district, county, and local political groups."²⁵

Among the affiliated organizations are: the National Socialist People's Welfare League; the German Labor Front; the Union of National Socialist German Jurists; the National Socialist German Physicians' Association; the National Socialist Teachers' Association; the National Socialist War Victims' Relief Association; the National Union of German Civil Servants; the National Socialist German Technical Association.²⁶

Suffrage and Elections

All German citizens of both sexes are entitled to vote when they have completed their twentieth year. The right to vote may be exercised in either elections or plebiscites.

The choice of deputies to the Reichstag may be taken as an example of elections. The country is divided into thirty-five election districts, which are joined in district unions. Sixty thousand votes are required to elect a deputy, and remainders above this number may be used as required in the district union or in the Reich at large, to guarantee the election of other candidates of the same party.

In preparation for the last Reichstag election which took place on November 12, 1933, national and district party leaders were called into consultation; and a list of 685 candidates was prepared as the official list of the National Socialist Party.

²⁵ Otto Meissner and Georg Kaisenberg, *Staats- und Verwaltungsrecht im Dritten Reich* (Berlin, 1935), p. 34.

²⁶ *Ibid.*, pp. 34, 35.

Not all the names placed thereon were those of party members ; for to make friends in certain quarters it was considered advisable to include an innocuous sprinkling of prominent persons who were not National Socialists. The completed list was presented everywhere for a "Yes" or "No" vote. Names might be added in localities, but these names were not placed upon the official list posted throughout the Reich. The voter had the choice of voting for the solitary Nazi list or of spoiling the ballot. A place was provided for the affirmative cross but no provision was made for a "No" vote.

Since there was no effective opposition, the National Socialist Party won an easy victory. A Reichstag was elected which could be trusted to take any action requested by the *Führer*. This result is naturally interpreted as meaning that : "The statement, 'Sovereign power proceeds from the people,' now for the first time becomes the truth. State and people become one, through the stimulus of the Party which carries the State."²⁷

The plebiscite has been employed under Hitler with excellent political results from the Nazi point of view. A law of July 14, 1933, bestowed upon the Cabinet the right to inquire by means of a plebiscite whether the people do or do not favor a proposed measure. Not only a general measure, but any law, may thus be referred to the people. Provisions which are of character to amend the Constitution may be included in a referred law. The plebiscite is decided by a majority vote.

The matter of Germany's withdrawal from the League of Nations was referred to the people at the same election in November, 1933, at which they voted for members of the Reichstag. The ballot for this important question contained a lengthy statement which left no doubt as to the viewpoint of the Cabinet. Then came the question : "Do you, German man, and you, German woman, agree with this policy of your National Cabinet, and are you prepared to declare it to be the expression of your own opinion and your own will, and solemnly to pledge yourself to it?" Under the question were squares for voting "Yes" or "No."

²⁷ Otto Meissner and Georg Kaisenberg, *Staats- und Verwaltungsrecht im Dritten Reich* (Berlin, 1935), p. 88.

The official figures for this plebiscite showed 757,756 ballots spoiled or invalid; 2,101,191 votes "No"; and 40,632,628 votes "Yes." The victory for Hitler was overwhelming.

Another plebiscite was held on August 19, 1934. The question at issue was popular ratification of Cabinet's decision to combine the offices of Chancellor and President of the Reich. This decision had been made when President von Hindenburg died, in order that Hitler might exercise the powers of both offices. Hitler desired popular acquiescence in this important constitutional change, and his wish was met by the results of the plebiscite. The affirmative votes numbered 38,362,760 and the negative votes 4,294,654. Although these results are less impressive than those of the former plebiscite, they still mean that the policies and the person of Hitler are supported by the vast majority of the German people.

It is impossible to decide how much real influence the people of Germany have, or can have, upon the government. What would happen if they should reject the official list of candidates? Would the Cabinet present a different list of candidates, or would it abolish the Reichstag? What would happen if the people should reject some proposal submitted to them in a plebiscite? Would the Cabinet proceed with its contemplated action? What would happen in case of a negative vote upon a question submitted to the people, which meant their support or rejection of Hitler and the National Socialist regime? Would Hitler and the Cabinet resign?

Such questions are unanswerable. This very fact is a demonstration of the uncertain position of the people as a factor in government. The one certain thing is, that the power and influence of Hitler and his Cabinet are enhanced if they can claim popular support. This is true in respect to both domestic and foreign relations. Hence propaganda, "discipline," and every possible means of assuring a spectacular victory for the Nazis at all elections, will continue to be employed assiduously. "The Führer's declared intention is to make a similar plebiscite an annual feature of his regime, and he claims that he is therefore being 'more democratic than the so-called democracies'." ²⁸

²⁸ H. P. Greenwood, *The German Revolution* (London, 1934), pp. 307-308.

Summary

In Russia, in Italy, and in Germany, there are no opposing political parties. In each of these countries one party alone is recognized by law and permitted to exist. The Communist Party in Russia, the Fascist Party in Italy, and the National Socialist German Workers' Party in Germany, are the officially recognized parties. Each of these is closely interwoven with the structure of the state.

The participation of the people in government—unless party activities are to be considered in this category—is very slight. True, there is universal suffrage for both sexes in Russia and Germany, and for male citizens in Italy. But elections are mere opportunities to vote "Yes" or "No" upon measures or lists of candidates proposed by the authorities of the state and the party—who are either identical or working in the closest cooperation. Propaganda, party organization, and the fear of violence quickened by the memory of past violence, have minimized dissent. Since each of the three parties named above came into power, it has won every election by great majorities. The question remains, whether this would be true, if open dissent were safe. However, this question is academic, so long as the dictatorships can rely upon a loyal army and police force. With modern weapons monopolized by the armed forces of the state, revolt is impossible without at least their tacit consent.

On the other hand, all dictatorships fear passive resistance, and every method of propaganda is used to arouse popular enthusiasm for the regime and its plans.²⁹ How successful this positive aspect of dictatorship may be is also an open question. The superficial observer can find only signs of enthusiastic assent; but of course dissent is necessarily silent. No government, however, can exist forever on a basis consisting chiefly of fear and compulsion. The governments of Russia, Italy and Germany have indicated their eagerness for real popular support, in many measures reminiscent of the Roman "bread and circuses." It seems probable that each has succeeded in being regarded as at least tolerable by a majority of its citizens.

²⁹ See H. L. Childs (ed.), *Propaganda and Dictatorship* (Princeton, 1936).

CHAPTER VIII

POLITICAL PARTIES IN DEMOCRACIES

One of the most remarkable features of modern representative government has been the rapid development of political parties. This phenomenon has occurred wherever representative government has taken the place of autocratic government.

The reasons for the rise of parties are not hard to find. Men have very different opinions as to the functions which should be undertaken by their governments, and the methods and agencies by which the said functions should be fulfilled. These opinions may be the results of propaganda, of particular economic or social interests, or of philosophical or political beliefs. Experience has shown that the opinions or views most likely to be adopted as the foundations of public policies are those on which large numbers of persons unite for common action. This action is normally the endeavor to disseminate their ideas, and to elect legislators and other public officers who agree with these ideas and will attempt to put them into effect. Parties, then, result from the fact that a considerable number of individuals can agree on enough proposals as to public action or policy, to make them feel it worth their while to seek control of the government with a view to having these proposals adopted.

Political parties are especially likely to develop when, as at the present time, the social and economic life of the people is in a condition of uncertainty, change, or transformation; when there is instability in political and business institutions; when opinions differ violently regarding methods of doing things. In many European countries, the period since the World War has been marked by the birth of party after party. The two dominant parties in the United States were formed under conditions of stress; and it is generally agreed that the develop-

ment of an effective third party in this country can be expected only when economic and social unrest are widespread.

Are parties necessary? That there can be government without parties is unquestionable, but it is very doubtful whether modern democratic government could be carried on without them. It is true that the party system was at one time generally decried, and that it is still considered by a few persons unnecessary and even dangerous;¹ moreover, there is no doubt that it is subject to serious abuses under certain conditions. Nevertheless, changing these conditions and thus preventing the abuses appears to most thinkers a more advisable and more practicable step—however difficult—than endeavoring to abolish parties, which appear to be the inevitable result of both agreements and disagreements on questions of public policy.

We have seen that as a general rule groups of persons who hold a given opinion or set of opinions must be organized if they are to have any effect upon the political life. Furthermore, the individuals who actually exercise the powers of government, in a democratic state, must of necessity have behind them great numbers of adherents who will work and vote to place them in office, will uphold their official acts and support them in various ways, and will aid in the general dissemination of knowledge regarding the public policies for which they stand. These services are performed by the rank and file of the political party. That a party, once established, may seek place, power, and sometimes illegitimate gains, and that it may forget doctrine and professed ideals, is not outside the range of possibility; but the original formation of the party is generally attended by some agreement as to principles and as to the ends which it is hoped to achieve as the result of organization.

Important functions of the party are the selection of candidates for office, the recommendation of these candidates to the voters, and the assumption of responsibility for the official acts of such party candidates as are elected. Even in a small State, it is impossible for the individual voter to know personally all candidates for a given office, to judge of their qualifications

¹ See, for example, President Washington's Farewell Address; Hilaire Belloc and Cecil Chesterton, *The Party System* (London, 1911), pp. 18-19.

from their own representations, or to exercise any control over the official acts of those who are elected. The party guarantees its own candidates, and if they become office-holders it seeks to prevent open and flagrant abuses, at least; since dissatisfaction on the part of the public may lead to the loss of the next election. In connection with this work the party may do much to educate the public on various political questions. The smaller parties, which have no hope of winning an election and consequently feel no fear that powerful elements may be alienated by strong expositions of policy, are especially useful in this way. It is hardly necessary to remark that the voter who really wishes to be informed should read the pronouncements of various opposing parties on the same question.

The nature of the party has been defined variously. Burke undoubtedly pictured what it should be, when he described a party as: "A body of men united for promoting by their joint endeavors the national interest upon some particular principle in which they are all agreed." This statement, however, is both too idealistic and too simple to serve as a working definition. Many parties confess in their very names that they are concerned, not with the national interest, but with the interests of some special class or group of persons. The parties that stand for some particular principle as to which their members are all agreed are relatively few in comparison with the parties that merely profess a general body of doctrine and advocate a number of specific measures, with most of which the bulk of the party membership will substantially agree, or at least with which it will not disagree so violently as to leave the party. Many members of long-established parties owe their affiliation to habit, to family tradition, or to other causes which do not imply any serious consideration of principle. Furthermore, many persons who hold office under a given party name will occasionally, from motives of conviction or of policy, violate the principles of their party in carrying out their administrative or legislative functions. Nor must it be forgotten that the older and stronger parties, particularly those which have held power for a long time, may have achieved their original purpose, or may have forgotten it; and that their later statements of so-

called principle may be little more than beatings of the drum to attract a crowd.

With all these considerations in view, we may venture to define a party as: A group of persons organized for active participation in political affairs, with the object of securing control of the government in both the legislative and the executive branches, and of so exercising this control as to secure certain ends in harmony with the policies advocated and the opinions advanced by the group as a whole. If the party is to succeed in its objects, it must be supported by many persons who regularly follow the leadership of this active group, call themselves by the name of the party, and under normal conditions vote for the candidates and the measures favored by the active controlling group.

Most parties are organized with a view to becoming permanent bodies. A few, such as Citizens' Parties or Reform Parties in municipal elections, or the supporters of some individual candidate, are avowedly ephemeral; but, whatever fate may decree in the end, it is the intention of nearly all parties to maintain their identity and to work for a program which they themselves recognize as a matter of years. Most parties, even if their aims were all achieved in the legislative realm, would desire to maintain their identity in order to elect public officers who would enforce the legislation in question.

The Parties in Various Countries

No two countries have identical groups of political parties. Some few parties, notably the Socialist and the Communist, are organized in many countries on the basis of platforms adopted at international conferences; but in most instances it will be found that national or local interests will bring about modifications of, or at least additions to, the policies set forth in these platforms.

Practically everywhere, however, the parties may be described as more or less conservative, moderate, progressive, liberal, or radical in their views and objectives. The expressions in general use for these various attitudes are: right, right center, center, left center, left. That is, a very conservative

party is described as belonging to the extreme right, a mildly progressive party is said to be in or of the center, and a party which desires to bring about radical changes in political, economic and social institutions is called a party of the left. These expressions are derived from the custom, in France and elsewhere, of seating parties in parliament so that the conservatives are at the right hand of the presiding officer, the radicals are at his left hand, and the members of other groups are arranged in between, graded as carefully as possible with reference to the conservatism or liberalism of their principles.

In England the expressions right, center, and left are used to denote respectively the Tory Party, the Liberal Party, and the Labour Party; but the seating scheme does not correspond to these designations, since the party or coalition in power, whatever its views, sits to the right of the speaker, and the party or bloc in opposition sits to his left.

In the United States neither of the two major parties falls decisively into the classification given above. It can hardly be said that, over a long period of years, one is more or less conservative or progressive than the other. The jocose designations of "Ins" and "Outs" express the difference between them more truly than any attempt to use the nomenclature just explained.

Certain other parties cannot well be included in the above category. Thus, one-purpose parties, such as those advocating woman suffrage, the restoration of a dethroned dynasty, anti-clericalism, or prohibition, lack a program sufficiently comprehensive to make them true parties of the right or the left. Anarchists, because they are opposed to all government; and Communists, because they seek to destroy parliamentary and other systems of government in which there is an opposition of parties, and to substitute a system of government with no opposing party, do not belong logically to any scheme or category which groups them in relation to other parties. It is true that they are often considered and mentioned as parties of the extreme left, but this is not strictly correct. For comparable reasons, it is doubtful whether Fascists and other such groups should be called parties of the extreme right.

The "Government" and the "Opposition"

The party which has a majority in the legislature or in the popular chamber of the legislature, and which, therefore, in all parliamentary countries, forms the Cabinet, is called the government party. If a majority is not held by any party, but must be constituted by the cooperation of two or more, those entering into the arrangement are called by some such name as the government bloc or the government coalition. The government party or coalition is said to be in power. The other party or parties which have elected members to the legislature are called the opposition.

It has been the accepted doctrine for many years that parliamentary government is at its best when there are but two powerful parties, one of which has a clear majority in the legislature. This party will form the Cabinet, and will support it in every way unless some very important question of public policy should lead enough members to vote with the opposition, to make a majority against the Cabinet. In such a case the Cabinet will resign; or, if it believes that the country in general supports its policy, it will ask for a dissolution of the legislature and a new election by which it hopes to obtain a majority to support it more firmly. If, however, the election should return a majority for the party which has hitherto been in opposition, the Cabinet must yield to the will of the people and retire from office, leaving to the party which has just come into power the congenial task of forming another Cabinet.

This ideal picture, which corresponded to facts in England for many decades, is seldom realized in any parliamentary country today. The rise of the Labour Party in England, and the very numerous parties in the legislatures of France and of other European countries, mean that the government is far more likely to be supported by a coalition than by a single majority party. It means, also, that since cleavages in the bloc or coalition are far more likely to occur than are serious derelictions from a single majority party, Cabinets are less united, less powerful, less able to give a firm leadership to the legislature, and far more likely to encounter crises that compel resignation, than they would be under a two-party system.

Executive, Cabinet and Party

In no modern country is the position of the Chief of State made directly subject to the fluctuations of party strength in the legislature. Under the parliamentary system, he is expected to recognize this strength by appointing the Prime Minister from the majority party or group; or, if there is no clear majority, by selecting a man of such influence as to warrant the expectation that a majority will be formed to support the leader chosen. So far as possible, the Chief of State is expected to keep his own partisan predilections in the background. In the United States, the Chief of State is himself a recognized party leader and the active head of the Cabinet. This means that, although the President's position would not be directly affected if either or both of the Houses of Congress should be controlled by his political opponents, there would be, under such circumstances, a relation of antagonism rather than cooperation between the Cabinet and the legislature. The two-party system does not produce the same results here as in a parliamentary country where the Cabinet must always have the support of a majority of the legislature.

Legal Control of Parties

In various countries, in the member States of the United States of America and of other federations, and even in certain subordinate units of government, the activities of parties in some directions are regulated by law or ordinance. Thus, the methods by which parties may nominate their candidates for national, State or local office, the use of money for all partisan purposes, the methods by which persons may become members of parties, or may prove their membership in order to vote in party primaries, and many other matters relating to party organization and functions, are all under legal regulation in certain places. There is an increasing tendency to regulate parties by law, in order to prevent not only direct frauds and abuses, but the use of inordinate sums of money in questionable ways to further partisan ends. In the totalitarian countries, as has been seen, the law prohibits the existence of more than one party.

Political Parties in England

Political parties in England are closely associated with parliamentary government. In earlier days, so long as the King and his councillors alone determined public policy, there might be divisions among the councillors, but there could be no parties in the sense in which the word is used today. When Parliament began to be the controlling authority, parties developed because joint action among members of similar opinions was clearly advantageous. It was possible for organized groups whose views differed from those of the King, to express their dissent, and even to prevail against the wishes of the sovereign, without being considered traitors to the King and without revolting against him. Exactly when Parliament became so organized as to make party action possible, it is difficult to determine with exactness, but parties were fairly well established by the latter part of the seventeenth century, and were strongly organized and very powerful by the time of the American Revolution.²

During this early period the electorate was very restricted. The parties, therefore, were in reality parliamentary factions, supported by the relatively few qualified voters. During the nineteenth century and the first part of the twentieth century, successive extensions of the franchise finally brought about universal adult suffrage; so that now the party strength is potentially the adult population.

The present form of Cabinet government in England is the direct result of the development of parties. It is the essential element of the English Cabinet system, that the government at any given time is under the control of a group of persons who are in general agreement upon various political principles and current policies. Preferably, such persons will belong to the same party. When this is not possible, the Cabinet must be a coalition of representatives of parties having enough in common to act together for the time being; but coalition government is not in the true pattern of the English system. The Cabinet must have the support of Parliament, particularly of

² A. D. Morse, *Parties and Party Leaders* (Boston, 1923), p. 7.

its elected branch, the House of Commons. Any party with a clear majority in this House forms the Cabinet. This system is traceable to the reign of William III, during which time the Sovereign became less important in actual government than had previously been the case, and the ministers became correspondingly more important. The party having the majority in the House of Commons naturally stood back of the ministers who were at the same time its own leaders, and by party strength maintained the Cabinet in power. The loss of a majority in the House of Commons was found to impede the work of the Cabinet to such an extent that it presently became the custom under such circumstances for the ministers to resign and give place to the leading men in the prevailing party. This system, in its main outlines, continues to the present day, but it is complicated by the rise of a third party.

✓ From this brief description it can be seen that the party system has been the chief factor in the building up of responsible parliamentary government in England.³ It is a curious fact that despite their extreme importance in the public life of England, political parties are not regulated by statute, and are indeed seldom mentioned in the laws. Their part in the government is a matter of constitutional practice rather than legislation, except as regards corrupt practice.

At the present time there are three parties in England which normally receive support from a considerable body of the electorate. These are the Conservative Party, the Liberal Party, and the Labour Party. There are a few other parties, which receive an aggregate of slightly more than one per cent of the votes cast. These latter include the Communist Party and the Independent Party.

THE CONSERVATIVE PARTY. The Conservative Party is the successor to the old Tory Party. The Tory Party stood for the divine right of Kings, for the Established Church of Eng-

³ For more detailed statements regarding the connection between the Cabinet system of government and the party systems, see A. L. Lowell, *The Government of England* (New York, 1919), Vol. I, Ch. XXIV; Sir Courtenay Ilbert in Josef Redlich, *The Procedure of the House of Commons* (London, 1907-1908), Vol. I, p. XV; F. A. Ogg, *English Government and Politics* (New York, 1929), pp. 480 ff.; Morse, *op. cit.*, pp. 7 ff.

land, and for opposition to religious toleration.⁴ Most of these beliefs, in considerably modified form, continue even to the present day in the Conservative Party. "The social institutions favoured by the Conservatives are crown and national unity, church, a powerful governing class, and freedom of private property from state interference."⁵ As a rule the Tories and their successors have opposed the extension of the suffrage. By and large, the Conservative Party has stood for strong nationalism as opposed to the new internationalism, and for individualism as opposed to state intervention along the lines commonly called "socialistic." At one time its economic policy was that of *laissez faire*, but in recent years the Conservative Party has been associated with the principle of protection.

THE LIBERAL PARTY. The Liberal Party is the successor to the Whig Party, which developed largely during the seventeenth century. During this time the name Whig was applied to those who claimed the right of Parliament to control succession to the throne, who believed in rather wide religious toleration, and who in consequence were generally considered radicals. Beginning with the Industrial Revolution, the developments in industry and commerce and the great social and economic changes which accompanied these developments brought about demands for far-reaching economic and social reconstruction. The Whigs, and their successors the Liberals, led the battle for such changes as the extension of the electoral franchise and the consequent destruction of the excessive political power held by the great landed interests; the establishment of free trade; the adoption of a foreign policy in sympathy with the liberal and nationalistic movements on the Continent; the abolition of slavery; municipal reform and various reforms in other units of local government; the regulation and improvement of education; and the development of a public health program. During the period of Gladstone (the latter half of the nineteenth century) decided steps were taken toward

⁴ See Maurice Woods, *A History of the Tory Party in the Seventeenth and Eighteenth Centuries* (London, 1924), Ch. I.

⁵ Herman Finer, *The Theory and Practice of Modern Government* (New York, 1932), Vol. I, p. 516.

self-government in the colonies. While the Liberals were in power from 1906 until the outbreak of the World War, they took steps in the direction of such social policies as workingmen's compensation, state insurance against sickness and unemployment, an old age pension system, the establishment of national labor exchanges, the creation of a large system of small holdings, and the granting to municipalities of wide powers in respect to town planning and housing.

The World War and the political events following it, particularly the dissensions among factions of the Liberal Party and the more advanced position on many social questions taken by the Labour Party, led to much loss of strength by the Liberals. For a time it was thought that the Liberal Party would disappear, but it is still in existence. In social and economic policies it seeks to take a pragmatic position, assenting to public control or ownership only in special instances. In general, it still stands for the policy of free trade. In respect to foreign policy the Liberal Party stands for a larger degree of cooperation by the colonies and Dominions with the mother country, and for a better understanding with foreign countries.⁶

THE LABOUR PARTY. The Labour Party, in comparison with the Liberal and Conservative Parties, is of very recent origin. It was founded by a Conference of Trade Union and Socialist bodies held in London on February 27, 1900, in consequence of a resolution passed by the Trades Union Congress in the previous September. This organization, which was at first named the Labour Representation Committee, was a federation composed of Trade Unions and various Socialist bodies. The purpose of the party as declared in the London Conference was "to establish a distinct Labour Group in Parlia-

⁶ For a discussion of Liberalism and the Liberal Party see H. L. Nathan and H. H. Williams, *Liberal Points of View* (London, 1927); Hubert Phillips, *The Liberal Outlook* (London, 1929); C. F. G. Masterman, *The New Liberalism* (London, 1920); J. M. Robertson, *The Meaning of Liberalism* (London, 1912); H. H. Fyfe, *The British Liberal Party* (London, 1928); H. L. Nathan and H. H. Williams, *Liberalism and Some Problems of Today* (London, 1929); The National Liberal Federation, 1877-1906, and certain reports of the party, particularly *Coal and Power* (1924), *The Land and the Nation* (1925), *Towns and the Land* (1926), *Britain's Industrial Future* (1928).

ment, who shall have their own whips and agree upon their own policy, which must embrace a readiness to cooperate with any party which for the time being may engage in promoting legislation in the direct interests of labour." The Labour Party in its origin was "an organization of defense and protest against the economic inequalities and social injustices produced by the capitalistic system." In 1906 the name Labour Party was adopted.

The British Labour Party, unlike the parties in the United States and the majority of parties on the Continent, is not built up along lines of individual membership, but is predominantly a federal organization composed of various groups. The great majority of the trade unions are affiliated with the party as corporate bodies, and form about 90 per cent of its total membership. There are also the individual members of three Socialistic groups, the Independent Labour Party, the Social Democratic Federation, and the Fabian Society.

Although the Labour Party is definitely a Socialist party, it does not follow, as do most of the continental Socialistic parties, the Marxian doctrines. "Compared with Continental Socialism, British Socialism has been tentative and experimental, saying little about the inevitability of the class struggle and much of the possibility of cooperation for communal ends, carried forward by men many of whom would indignantly repudiate the name Socialist, sitting lightly to theories, caring little for consistency, and swinging, according to the economic and political circumstances of the moment, from emphasis on industry as a social function to be carried on for the direct service of the whole community to insistence that no social order is tolerable in which the organized producers do not have an effective voice in determining their own industrial conditions."⁷ British Socialism seems to have begun to realize that it can maintain its principle of socialization by several different methods. Although its favorite formula has been nationalization and municipalization, it does not necessarily think that businesses shall be run by the government bureaucracy. It is

⁷ R. H. Tawney, *The British Labor Movement* (New Haven, 1925), p. 159.

coming much more to the belief that much socialization can take place through the cooperative movement; that permanent commissions or state created and managed corporations can administer electricity, railways, mines, municipal transportation facilities, radio broadcasting, and similar enterprises; and that various other methods will have to be employed for solving the problems of production and distribution of goods and services.⁸

THE COMMUNIST PARTY. Communism, differing from Socialism, though basing its philosophy on the writings of Marx and Engels, believes that the abolition of private ownership and the establishment of state collectivism can result only from revolution. The Communist Party in Great Britain arose in 1920. It attempted to gain control in the political life of the country by gradually capturing the Labour Party. On three different occasions it made application for membership into the Labour Party. At the Annual Conference in London in October, 1924, the Labour Party refused affiliation to the Communists. A further blow was struck at affiliation by the Conference held at Birmingham in 1928. Since that time the Communist Party has entered the field in opposition to Labour. The party is of little present significance as it has only about a few thousands of members.⁹

There can be no doubt that the English political parties represent very different reactions to social and economic problems. Each of them believes in its particular mission. Each has principles that are quite different from those of the others. It should be obvious that there is a vast gulf between the Conservative Party and the Labour Party. The gulf between the latter and the Liberal Party is not great in respect to many concrete issues. The Liberal Party would like to attain many of the same results as the Labour Party but without definitely adopting the principles of socialism. The gap between the Labour Party and the Communist Party is less important in

⁸ See the Birmingham Conference Program of 1928, entitled "Labour and the Nation"; Arthur Greenwood, *The Labour Outlook* (London, 1929), Ch. I; Egon Wertheimer, *Portrait of the Labour Party* (London, 1929).

⁹ Wertheimer, *op. cit.*, pp. 27 ff.

respect to ultimate aims than in respect to the method of securing control of the state. The Labour Party would obtain control by purely parliamentary tactics, whereas the Communist Party would do so by violence if necessary.

Political Parties in France

There are a considerable number of political parties in France. Some of these have definite aims and programs, but several differ so slightly from the parties to the right or left of them, that an outsider finds it almost impossible to understand their special characteristics. Indeed, these parties may agree with others on all but one or two objectives; they may be less program parties than personal groups; or they may be merely transitory. Occasional changes of name, and the frequent grouping of several parties into a "bloc," "league," or "alliance," which may be fairly permanent or which may fall apart within a short time, and in either case may undergo a series of alterations in composition and control, make the French party situation very difficult to understand or to describe. Perhaps a dozen different parties can obtain seats in Parliament; practically every Cabinet that is formed is supported by a bloc of three or more.

THE PARTIES OF THE RIGHT. The Conservatives or Nationalists are a small group with extremely reactionary ideas. This group, and that of the Independent Republicans, contain a few persons who still cherish anti-republican views, and perhaps the hope of restoring a monarchy. Others who have no such aims are nevertheless opposed to economic, social and political democracy, and in favor of conservative institutions and measures. There are a few members of a bloc which is called the Republican Independents.

The Republican Federation is more moderate in its conservatism. Its members resemble in certain respects "the great moderate republicans of the last generation . . . This is really a party of social defense in which the great captain of industry mingles with the *bourgeois* Catholic, but in which the bewildered republican can find no trace of the true republican tradi-

tion."¹⁰ Next toward the center is the Party of Independent Popular Action.

It is easy to see that these right-wing groups have something in common, but that they differ in many details. Much of their program on paper is undoubtedly more liberal than it would be in practice if they should ever come into power. By and large, the parties of the right represent the church, the old bourgeois families, and the aristocratic elements. Most of these parties are not very strongly organized. They believe that they represent "a tendency, an orientation, a principle of life and action always capable of new realizations."¹¹

THE PARTIES OF THE CENTER. The Republicans of the Left and the Independent Radicals, despite their names, are really parties of the center. The first-named is composed of "republicans of very moderate views . . . (who) are being joined in increasing numbers by men of reactionary origin elected by majorities based on the Right, but who . . . tried to go as far as possible toward the Center."¹² The Independent Radicals are a newer group composed of dissenters from both directions, who are more progressive than the Republicans of the Left, but are not definitely committed to a Socialistic program. The Center has been well compared to a watershed dividing two slopes by a ridge so sharp that one is almost bound to fall either to the right or to the left.¹³

There is a strong left center, composed of Popular Democrats, the Democratic Left, and the Independent Radicals.

THE PARTIES OF THE LEFT. Several small parties hold a bloc of seats between the Independent Radicals and the important group which calls itself the Radical Socialists. This party is so moderate in its tendencies that many persons consider it for all practical purposes a party of the Center. According to its own spokesmen its basic ideas are those of the Declaration of the Rights of Man and Citizen. It is not collectivistic or

¹⁰ André Siegfried, *France, a Study in Nationality* (New Haven and London, 1930), p. 89.

¹¹ Fernand Corcos, *Catéchisme des Partis Politiques* (Paris, 1927), p. 42.

¹² Siegfried, *op. cit.*, p. 87.

¹³ *Ibid.*, p. 86.

Communitic; but it seeks to maintain a system of private property which "supposes, in its application, limits and regulation, if it is desired to avoid the very grave abuses of egoistic capitalism and of plutocracy."¹⁴

The Socialist and Republican Union Party, established in 1911, differs but slightly in its principles from those of the Radical Socialists. Persons are continually going from one party into the other.

The Socialist Party is one of the oldest political parties of France, having been organized in 1876. This is decidedly a class party whose program consists in attempting to transform the capitalistic system into a Socialistic system by means of the political and economic organization of the proletariat. Its doctrines are in general those of the Second International.

The Socialist-Communist Union was organized in 1923. This party is composed "of communistic elements who refuse to accept the practices of the Third International, and of socialists who do not wish to follow further the guidance of the Second International."¹⁵ It was organized by persons who believed that there was "no movement either in the Socialist Party or the Communist Party that seems to meet the needs of the mass of the workers." It is predominantly the party of united workers. Its program, which it describes as Socialistic, is based on belief in the class struggle, the gaining of power through revolution, a preliminary and impersonal dictatorship of the proletariat, the disappearance of capitalism, the establishment of a Communistic regime.¹⁶

The Communist Party in France is a member of the Third International. It "considers itself as a section of one sole great Communist Party of the world, whose directorate sits at Moscow under the protection of the first triumphant proletarian Revolution."¹⁷ Since this party is avowedly opposed to all government as organized at present, it is often described as standing outside the left group, in a sort of limbo.

¹⁴ Corcos, *op. cit.*, p. 82.

¹⁵ *Ibid.*, p. 133.

¹⁶ *Ibid.*, pp. 133 ff.

¹⁷ *Ibid.*, p. 138. For discussion of Third International refer to any encyclopaedia.

France has also its Fascists and its Anarchists, whose principles resemble those of similarly named parties elsewhere. These groups are not very powerful and are not represented in the Chamber of Deputies.

PARTY ORGANIZATION IN FRANCE. Until the end of the last century France could hardly be said to have party organizations comparable to those of the United States. Recently, however, the former fluctuating and chaotic system of party groupings has given place to a somewhat greater degree of organization, particularly in respect to the parties of the left. This is due in large part to the example of the Socialists, who began in 1905 to hold annual conventions at which they formulated their principles.¹⁸

The parties of the right are still little more than groups without much party organization. The parties to the left and a few in the center are much better organized.

The Radical Socialist Party has a rather complex organization, corresponding in a way to the organization of the English Labour Party. Membership includes local groups approved by the departmental federation and admitted by the executive committee of the party (which consists of the party members who have seats in Parliament); newspapers, likewise admitted by the executive committee; and a group of ex officio members, including deputies, senators, the general councillors of the department and the arrondissement councillors, all of whom pay dues. To belong to the party one must accept the minimum program of the party and must support party candidates at elections. Members may be removed by the national executive committee. The members in each commune constitute the communal committee which sends delegates to the canton or arrondissement committees. These in turn send delegates to the departmental committee, which sends delegates to the annual Congress.¹⁹

The Socialist and Republican Union is also rather well organized. The local groups in each department form a fed-

¹⁸ E. M. Sait, *Government and Politics of France* (Yonkers, New York, 1920), pp. 331-332.

¹⁹ *Ibid.*, pp. 359 ff.

eration and send delegates to an annual convention or Congress. The administrative committee, composed of the parliamentary members, nine members elected by the annual convention, and a delegate from each departmental federation, meets every three months. It appoints an executive committee of fifteen members, and a staff for the carrying on of party business. All candidates must subscribe to the party platform and must have their nominations confirmed by the proper federal committee.²⁰

The members of the Socialist Party in each commune form a section (in Paris, a section is formed in each arrondissement). The sections within each department form a federation having its own administration, and governed by an annual Congress. The direction of the party is assured by the National Congress which meets annually, and which is composed of the delegates elected by each federal Congress. The National Congress elects the national council, which carries out the decisions of the National Congress. There is also a permanent administrative commission composed of twenty-four members elected by the Congress, which executes the decisions of both the Congress and the council, and which has a right to call an extraordinary Congress if necessity arises.²¹

The Communist Party is organized much as is the Socialist Party. It differs from the Socialist Party, however, in such particulars as its subordination to the Third International, and a greater centralization, by virtue of the fact that more extensive powers are conferred upon its executive organs. Between the annual meetings of the Congress a great deal of initiative is exercised by a directing committee of twenty-four members. There is also a bureau of seven members which assumes "the collective responsibility of directing the party and its organs, under the constant control of the directing committee."²²

Most of the parties have periodicals of various sorts including magazines, journals and daily newspapers.

The party situation in France furnishes a vivid contrast to

²⁰ *Ibid.*, p. 363.

²¹ Jean Carrère and Georges Bourgin, *Manuel des partis politiques en France* (Paris, 1924), pp. 165-166.

²² *Ibid.*, pp. 185-186.

countries which have only a few very important parties with great numbers of members and supporters. From the American or English viewpoint many of the French parties would hardly be called parties, since they are scarcely more than groups of committees, whose chief functions are to work out programs in view of approaching elections and to nominate certain candidates. These groups, particularly the center groups, have little discipline. Moreover, the different groups do not coincide in the Chamber of Deputies and the Senate. Deputies do not always adhere strictly to their groups or parties, but on various questions may join other groups. "It is not rare to see the members of a group divided upon an important vote, some voting in one way, others in an opposite way, and the rest absenting themselves."²³

Although, in general, there are three main divisions of political opinion, that of the conservatives, that of the moderates, and that of the radicals, the different parliamentary groups "reflect all the fine shades of opinion, although sometimes they are distorted by personal ambitions (certain groups would lead easier to Cabinet rank, and others to chairmanships in committees). In the end one is attracted back to the fixed axes of general tendencies which exist outside the parties or groups and of which they are the interpretation. These general tendencies filter through, by influencing deputies when they vote. It is a subtle game, which gives a diversity to our public life that is lacking under the ponderous discipline of the English parties."²⁴

In the general elections held in May, 1936, the real issue was "Right" versus "Left." The Leftist bloc, which was composed of Radical Socialists, unified Socialists of the Left, and Communists, all assuming the title of "The Popular Front," won a safe majority in the Chamber of Deputies. Leon Blum, the leader of the unified Socialists, became Prime Minister in June. He succeeded in obtaining a considerable amount of important labor legislation, including a basic 40-hour working week and the recognition of collective bargaining. Parliament

²³ *Ibid.*, p. 31.

²⁴ Siegfried, *op. cit.*, p. 77.

refused to follow his leadership, however, in respect to establishing control over the currency, and in respect to other financial proposals. He was succeeded by Chautemps in June, 1937.

Political Parties in the United States

The Constitution of the United States does not contain a single intimation of the existence of political parties. At the time of its adoption, parties were quite generally believed to be a political evil and a menace to the state. In his Farewell Address, Washington took occasion to point out the dangers of parties. The spirit of faction and party, he declared, "... unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind. It exists under different shapes in all governments, more or less stifled, controlled, or represented; but, in those of the popular form, it is seen in its greatest rankness, and is truly their worst enemy."²⁵

Nearly everyone agreed with these views. Various provisions in the Constitution of the United States were particularly intended to lessen the spirit of partisanship, cabal, and faction. Thus, the selection of the national President by State electoral colleges rather than by popular vote was intended to prevent "the danger of intrigue and faction if the appointment should be made by the Legislature . . . as the Electors would vote at the same time throughout the U. S. and at so great a distance from each other, the great evil of cabal was avoided."²⁶ It was argued in *The Federalist* that the provisions for the methods of election to the two Houses of the national legislature "promise greater knowledge and more extensive information in the national councils, and that they will be less apt to be tainted by the spirit of faction."²⁷

²⁵ L. B. Evans (ed.), *Writings of George Washington* (New York and London, 1908), p. 539.

²⁶ Report on the clause concerning the election of the President, discussed by Gouverneur Morris. Mason agreed that the plan would remove "the danger of cabal and corruption"; and Butler thought it "not free from objections, but much more so than an election by the Legislature, where . . . cabal faction and violence would be sure to prevail." Madison's *Debates in the Federal Convention of 1787*, entry for Tuesday, September 4.

²⁷ *The Federalist*, No. XXVII.

It is interesting to find that the theoretical objections to parties and factions by no means prevented the actual existence of such groups. John Adams wrote: "In New York, Pennsylvania, Virginia, Massachusetts, and all the rest, a court and a country party have always contended."²⁸ Madison saw an important factor in the party situation when he said: "But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations and divide them into different classes, actuated by different sentiments and views."²⁹

PARTY DIVISIONS AND PARTY LABELS. Generally speaking, economic motives have given rise to the two-party system which has always prevailed in the United States. Those having large industrial, financial, and exporting interests have been connected with the Federalist-Whig-Republican Party. Those having agricultural interests and importing interests have allied themselves with the Anti-Federalist-Republican-Democratic Party. It is true that the Republican Party at the time of the Civil War, because it identified itself with abolition and the preservation of the Union, drew into its fold a great number of farmers whose children and grandchildren still remain Republicans; but it is also true that this group has taken an independent attitude from time to time, whenever conditions have caused widespread suffering among the agricultural classes.

Although space does not permit a description of the policies which have been fostered in the course of their existence, by the two principal parties, a broad general statement may be attempted. By and large, the Federalist-Whig-Republican Party has stood for a liberal interpretation of the national

²⁸ Letter of John Adams to William Keteltas, C. F. Adams (ed.), *The Works of John Adams* (Boston, 1850-1856), Vol. X, pp. 22, 23.

²⁹ *The Federalist*, No. X.

Constitution in respect to the powers of the central government; it has favored a strong judicial system under which the federal courts could pass upon the constitutionality of both State and federal laws; it has supported high protective tariffs for American industries; it has demanded a centralized banking system, a currency system based upon the gold standard, a strong navy for the protection of American commercial and financial interests, the promotion of commercial enterprise, and light taxation of great wealth. There are certain exceptions to this picture, but it is true in the main.

The Anti-Federalist-Republican-Democratic Party, on the contrary, has stood for "states' rights" and a narrow interpretation of the powers of the central government under the Constitution; for a low tariff; "easy money" and (at times) a bimetallic standard; a very moderate army and navy; and a taxation system which would not bear too heavily upon the farmer and the poorer classes.

Of late years the old lines of cleavage between the Republican and the Democratic Parties have become very confused. There are several important factors causing this confusion. The first of these is undoubtedly the fact that manufacture and large-scale production leading to a desire for a "protective tariff" have gradually spread into formerly agricultural States. Thus, the members of Congress from States like Oklahoma and Texas, whether Republican or Democratic, will work for an import duty on oil. Democrats from Alabama, with its steel and iron interests, will vote for a high tariff on such products. In the Carolinas and Georgia, the development of cotton mills and other manufacturing establishments means that Democratic members of Congress from those sections will almost certainly vote for a high tariff on cotton goods and other commodities which might compete with the products of their States. Many Republicans are experiencing similar changes of heart. Since the World War enormous sums of money have been invested by American capitalists in industrial enterprises abroad. These enterprises cannot flourish unless they can find American markets. Many American manufacturers, in order to save labor costs, have built foreign plants. Such manufacturers are very

anxious to have American markets opened to them without burdensome tariffs.

The attitudes of both major parties toward the activities of the federal government have changed. The southern agricultural States, traditionally Democratic, need and ask federal aid in respect to highways, flood control, agricultural relief and credit; whereas the Republicans, though "a strong central government" has been one of their major tenets, fear an increase of taxes for these purposes, and often oppose them.

Another source of confusion is the fact that organized labor has neither joined one party nor organized a party of its own. It prefers to remain politically independent; there is consequently no definitely "left" party of great numerical importance.

Very frequently both major parties evade committing themselves definitely on serious controversial issues, and take uncertain, equivocal, and opportunistic attitudes toward them, lest decided stands should involve the alienation of various groups of voters.

Many persons see in this situation the decadence of the two-party system in the United States. Thus, President Butler of Columbia has said: "Today there are no real political parties in the United States and there has been none for years past . . . We keep on using the names and following the forms of party organization and party difference, but we are only playing with labels without anything upon which to put them. If it be said that there is a Republican or a Democratic majority in any given legislative body, one must next inquire who constitutes that majority, and will its members agree among themselves to vote together on questions of fundamental principle. A truthful answer must be uniformly in the negative. They will not."³⁰

Although from time to time other political parties have arisen, such as the Greenback, the Populist, and the Non-Partisan League, most of these have been short-lived. Yet they have accomplished something, for they have "set most of the leading issues of the past fifty years—the income tax, regu-

³⁰ *New York Times*, March 24, 1931.

lation of railways, popular election of Senators, limitation on the use of injunctions in labor disputes, woman suffrage, and 'farm relief' in all of its manifold phases."³¹ Because of the fact that we do not have proportional representation in national elections, many of these parties have never had a representative in the national legislature.

Several of the smaller parties, on the other hand, have existed for a considerable length of time and on certain occasions have polled many votes. Among these are the Prohibition Party, the Socialist Labor Party and the Social Democratic Party.

The Prohibition Party, founded in 1869, has had for its primary object the legislative prohibition of the manufacture and sale of intoxicating liquors, although it has been interested in other reforms as well.

The Socialist Labor Party, established in 1876, represents orthodox Marxianism. Its doctrinaire attitude has met with little response among the working classes in the United States, and it has never been a strong national party; nevertheless it survives.

The Social Democratic Party resulted from the railway strike of Chicago in 1894, when the attitude of the federal government and the use of troops deeply antagonized the American Railway Union and their sympathizers. Under the leadership of Eugene V. Debs a party was formed. In 1901 an attempt was made to unite the two Socialist parties, with such a degree of success that over half of the Socialist Labor Party joined the Social Democratic Party. This combined group is now called the Socialist Party.

The maximum strength of the Socialist Party was attained in 1920, when it secured 915,000 votes for President. It has been able to elect one or two members of Congress and a considerable number of local officers, such as mayors. Its program is "evolutionary," as opposed to the "revolutionary" ideas of the more radical Socialist Labor Party. Both of these parties, like all Socialist organizations, seek to remove the

³¹ C. A. and William Beard, *The American Leviathan* (New York, 1930), p. 87.

ownership of capital and capital goods from private hands and to substitute ownership by the state.

The Communist Party is very small but very active. It was organized in 1919, by a withdrawal from the Socialist Party of the extreme left wing. The Communist Party and the Communist Labor Party were merged in 1920, and in 1921 the name of the party was changed to the Workers' Party, but it is still generally called the Communist Party. Its objects are practically identical with those of Communist groups in other countries, namely, the overthrow by violence of the present capitalistic economic regime and the present political organization, and the substitution of a new political-economic "workers' state."

PARTY ORGANIZATION IN THE UNITED STATES. The political machinery of the party in the United States is generally set up in four divisions, city, county, State and national. Each of these has its own special functions, but all cooperate whenever there is national work to be done, such as the election of a President.

In the city the election precinct is the smallest area of party activity. The precinct ordinarily contains from 350 to 600 voters. In each precinct the party organization maintains an agent variously known as precinct executive, committeeman or captain, who is responsible for securing as many votes as possible at all elections. Above the precinct is the ward, which generally covers some 14 to 30 precincts, with from 8,000 to 20,000 voters. The ward executive selects and appoints the precinct executives and maintains close connections with them. The highest power is the central city organization, which is usually a committee, under the control of a "boss." The city organization is the source of plans for winning elections, either to individual offices in certain districts when nothing more can be hoped, or to all important elective municipal positions. It is also the source of patronage when the party is in power or is able to make "deals" with the opposition party; and of favors and help for its supporters which, while not regarded by anyone concerned as being bribes, are certainly intended to strengthen the good will of voters and their fidelity to the party.

The county organization occasionally stands above the city organization, but is usually quite separate. In small municipalities, boroughs, villages and the like, the party machinery may be interlocked with that of the county. In very large municipalities, city and county may be identical or nearly so, but for the most part the good-sized cities maintain distinct party structures. The county is divided into districts for party purposes. These districts may or may not be identical with districts established by law for other ends, and they may or may not be subdivided. In each district a party worker is active, and perhaps a committee as well. The county committee, generally composed of committeemen from the subdivisions, nominates persons for county offices, controls county patronage, and assists in the work of the State committee.

The functions of the State committee are to fix the dates for party primaries, and to fix the dates and make plans and preparations for State and city conventions. The State chairman is in charge of State headquarters, and actually or nominally manages the State campaign. He also takes charge of collecting and handling the campaign funds and supervises the campaign expenditures. The central State committee and the committees in each legislative district and county division have great influence in the distribution of patronage.

The central directing agency of the party is the national committee, which is composed in both the Republican and the Democratic parties of one man and one woman from each of the 48 States and from Alaska, the District of Columbia, Hawaii, the Philippines and Puerto Rico. The members are chosen for a term of four years. Some of them are elected by the State delegations to the national party convention, some by partisan voters of the States at the direct primary elections, and still others by the State party conventions. The national committee has the general supervision of the national campaign. The chairman of the committee is to all intents and purposes the commander-in-chief of the campaign. The work of the national committee is continuous, involving the collection of funds, the supplying of news items to the press, the distribution of campaign literature and the carrying on of

propaganda. The national campaign is carried on in each State, county and city, by the committees and executive agents described above.

Conclusions

It is one of the most important features of modern democracy that free and open partisan opposition in the political realm is permitted. Although it has always been recognized that parties may be employed as machines for bringing about anti-social ends, for carrying out the selfish purposes of predatory groups, and for supporting persons in power who are strangers to the very idea of public service, it has also been recognized that parties may be employed for the advantage of the people.

When issues are clear, and possible attitudes or courses of action in regard to these issues are few and definite; when parties are few, are led by intelligent, honest, and unselfish persons, and are strongly committed to opposing attitudes toward the issues at stake, the party system functions at its best. When these conditions are lacking, and particularly when party divisions are chiefly, as the popular by-word has it, the "Ins" against the "Outs"; when so many parties arise that no course of action can ever be taken without compromises that are fatal to any definite line of policy; or when the leadership of all the larger and more powerful parties is corrupt, the party system functions at its worst.

CHAPTER IX

THE CHIEF OF STATE

In nearly every country some one personage, as a King, Queen, President, or Royal Governor, holds the position of Chief of State. The form and title of the office, the method by which the incumbent is selected, the dignities and rights with which he is invested, and the powers which he exercises, differ greatly in different countries.

The Chief of State in the United States of America is a President. His office is established by the national Constitution. There was much disagreement in the convention which drafted the Constitution, as to the advisability of placing a single individual at the head of the government. Thus, Mr. Randolph opposed such a proposition, on the ground that: "He regarded it as the foetus of monarchy . . . He could not see why the great requisites for the executive department, vigor, despatch and responsibility, could not be found in three men, as well as in one man. The Executive ought to be independent. It ought, therefore, in order to support its independence, to consist of more than one."¹ As a result of much debate and many compromises, the convention finally decided to make the Head of State a single individual called a President, elected in a complex manner (which will be discussed later). The Constitution gives this officer a position coordinate with the legislature rather than subordinate to it; makes him the active head of administration instead of entrusting the administrative functions to a Cabinet with a Prime Minister such as we find in Germany, France, England, and many other countries; and invests him with important powers of appointment as well as the power to veto legislation.

✓ In France the Chief of State is also a President. The office

¹C. C. Tansill, *Documents Illustrative of Formation of Union of American States* (Washington, D. C., 1927), p. 132.

is not organized by the constitutional laws. The two Houses of the legislature, meeting as a National Assembly, elect the President without seeking any direct or indirect expression of the choice of the people. The President is not coordinate with the legislature, and does not possess a veto power. He has large powers of appointment, but these are exercised under the control of various ministers. He is not the head of the administration.

The Chief of State in England is a King or Queen, who inherits the throne under conditions fixed by law. The dignity and social importance of the office are very great, but the final power in government rests with the Cabinet, subject to the approval of Parliament. The Sovereign is the nominal head of all executive and administrative functions, as well as the nominal supreme law-giver, but these interesting legal fictions have no constitutional basis in fact at the present day.

Such is a summary picture of the office of Chief of State in three different countries. It should be kept in mind while we proceed to examine more closely the position of each of these three Heads of State.

Constitutional Position of the Chief of State

THE PRESIDENT OF THE UNITED STATES. The fathers of the Constitution, imbued with the doctrines of Montesquieu concerning the separation of powers, made the President of the United States the active executive head of the government. Since fear of monarchical tendencies prevented them from establishing the President in office for his lifetime, they arranged that he should be chosen for four years, with no restriction as to the number of times that he might be re-elected. The same fear of monarchy was allayed by giving him certain well-defined powers, and by providing for his removal by impeachment, should such a step seem necessary. It was decided that the President should be elected by an Electoral College, the members of which were to be chosen from the various States. The President was made a branch of the government coordinate with the legislature, receiving his powers not from the legislature, but from the Constitution. He was not to be under the

control of either the States as such, or the State legislatures, as many members of the Constitutional Convention seemed to desire.

It is important, when discussing the Presidency in the United States, to consider also the Vice Presidency. Unlike other important countries, the United States provides the President with a sort of contingent successor or substitute in the Vice President, who takes up the duties of the Presidency, whenever the office falls vacant or the President is unable himself to discharge his duties.

Up to the present time, no President has resigned and none has been removed. At least twice, namely, after President Garfield was wounded by an assassin, and during the prolonged and serious illness of President Wilson, the Chief of State has been incapacitated for so long a period as perhaps to warrant the assumption of the presidential functions by the Vice President; but this was not formally done. No definition of presidential inability is laid down by the Constitution, and in case the President, however ill he may be, refuses or fails to surrender his duties to the Vice President, there is apparently no authority which can compel him to do so, not even the Congress. Six Presidents have died in office, and as a consequence six Vice Presidents have automatically succeeded them as Chief of State.

The Vice President has a very anomalous position in our constitutional system. He is invariably chosen because of political considerations; that is, not because of any thought that he would make a good President, but because the party nominating him hopes to be supported by the State or geographical section in which he lives. He has no constitutional function except to preside over the Senate. He is not the head of any department of the government, nor is he a member of the Cabinet, although he has been invited to attend some of its meetings. The Constitution does not even make it certain that there will always be a Vice President, as it fails to provide any method of filling this office in case the incumbent has died, resigned, been removed, become so infirm as to be unable to attend to public business, or succeeded to the office of President.

It does, however, empower Congress to "provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officers shall then act as President."²

As early as 1792, Congress acted on this authorization, by passing a law which provided that the President pro tempore of the Senate should succeed to the Presidency in the case mentioned above; or if this officer should be unavailable, the Speaker of the House of Representatives should become President. This arrangement was so uncertain, and so objectionable politically, that in 1886 a law was passed providing that after the Vice President the heads of the executive departments should succeed in the order of the establishment of these departments, which would, therefore, be in the following sequence: Secretary of State, Secretary of the Treasury, Secretary of War. No provision was made for the possibility that the President-elect and the Vice President-elect should both die or become incapacitated after the Electoral College had adjourned, but before inauguration; nor was any provision made in case the Electoral College should fail to elect a President or a Vice President. The Twentieth Amendment to the Constitution of the United States, adopted in 1933, provides for these contingencies.

THE PRESIDENT OF FRANCE. The office of President of the French Republic is established nowhere in the constitutional laws of France. It is merely inferred from the fact that various provisions of these laws are made applicable to the President of the Republic. This is due to the circumstance that both Thiers and MacMahon had been invested with the Presidency before the constitutional laws were passed, coupled with the fact that many royalists still hoped in 1875 that the Presidency would soon give place to a monarchy. The office is actually recognized, rather than created, by the Constitution. Nominally, the powers of the French President are very great; in practice he exercises them under the control and signature of

² Art. II, Sec. I, Ch. 6. See also the Twentieth Amendment, which gives Congress the power to legislate regarding several of the contingencies here named.

the responsible Cabinet. According to the Constitution he is not responsible to the legislature for his official acts, except in one case, that of high treason.

The constitutional laws contain no provisions such as are found in the Constitutions of the United States and of Germany, clearly and definitely bestowing the executive power upon the President. At the time when the constitutional laws were adopted, France already possessed a President on whom a special law³ had bestowed the executive power, and it is assumed that this provision applies to his successors in office.

Since the National Assembly selects the President, it is not necessary to have a Vice President in case of the death of the former; as a new President can be elected almost immediately. During the brief interval between the death in office of a President and the election of his successor, which at most is a period of a few days, the Cabinet is invested with the executive power. The recent tragic death of President Doumer demonstrated the rapidity with which it is possible to choose the President of the Republic. Strangely enough, no provision has been made in case the President is unable to discharge his duties because of severe illness, absence from the country, or mental incapacity.

THE KING OR QUEEN OF THE UNITED KINGDOM. The Chief of State in England has been a King or Queen for many centuries, with the one important exception of Cromwell. In the Anglo-Saxon days the King was elected. Gradually, however, the office and the lands governed under the King became associated, so that hereditary claims grew up. During the Tudor period, as Parliament began to increase in power, it pronounced that when the line of the sovereignty was broken, or when there was uncertainty or dispute, Parliament possessed the right to fix the succession. This right was exercised in the Act of 1533, which bestowed the succession to the throne upon the heirs of Henry VIII and Anne Boleyn, and in the Act of 1544, which fixed it, in the event of the death of Edward VI without heirs, upon Henry's daughter Mary and her heirs, and next upon Henry's daughter Elizabeth. In 1688 the Crown

³ Law of November 20, 1873.

was given jointly to William and Mary by a parliamentary enactment. At present the inheritance of the Crown rests upon the Act of Settlement of 1701. It can thus be seen that although the Crown is hereditary, it is entirely under the control of Parliament. The King is a hereditary monarch whose tenure rests upon the will of the nation as laid down by law.

No provisions are made by law for the incapacity of the monarch, as the result of infancy, insanity or other reasons. Each particular case is dealt with as it arises. Thus, a regency was appointed to take over the duties of George III when that unfortunate monarch became insane; and in 1928-1929, when George V was gravely ill, Councillors of State were named to carry on his functions. When Edward VIII abdicated, in December, 1936, an unprecedented situation arose to which the Act of Settlement was inapplicable, as the Sovereign had not died and no heir could claim succession. Parliament passed an act which made Edward's brother, the Duke of York (now George VI) his successor to the throne. The power of Parliament in such emergencies is never questioned.

The position of the King of England is well summarized by Ogg, who says:

21
Viewed from a distance, British kingship is still imposing. The sovereign dwells in a splendid palace, sets the pace in rich and cultured social circles, occupies the center of the stage in solemn and magnificent ceremonies, makes and receives state visits to and from foreign royalty, and seems to have broad powers of appointment, administrative control, military command, law-making, justice and finance. Examined more closely, however, the king's position is found to afford a particularly good illustration of the contrast between theory and fact which runs so extensively through the English governmental system. On the social and ceremonial side, the King is fully as important as a casual observer might take him to be; indeed, one has to know England rather well to appreciate how great his influence is in at least the upper levels of society. But his positive control over public affairs, appointments, legislation, military policy, the church, finance, foreign relations—is almost nil.⁴

⁴ F. A. Ogg, *English Government and Politics* (New York, 1930), p. 106.

The army, the navy, and even the postal service are called "His Majesty's." Actually it is perfectly well understood that these belong to the people of England and not to the King. Even the public officers are appointed not by the King but by the ministers. A speech from the throne, which is read by the King at the opening of Parliament, purports to lay down the King's policy. In fact it is largely prepared by the ministers, and may contain many provisions to which the King is personally opposed. Government measures are theoretically framed and executed by the Crown, but the King may know little about them. Like the President of France, also a parliamentary state, the King of England is only a nominal executive, for he may not perform any public act which involves the use of discretionary power except upon the advice of his ministers, who by their countersignatures assume responsibility for such act. The King does, however, have some functions which will be discussed later. It is undeniable that his personality may tend to give him real power.

Choosing the Head of State

THE PRESIDENT OF THE UNITED STATES. The selection of the Head of State in the United States is theoretically governed by the federal Constitution, but in practice it is a strange mixture of a constitutional method with an extra-constitutional method.

The election of the President is governed by Article II of the Constitution, and the Twelfth Amendment. Both the President and the Vice President are to be elected as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress: but no senator or representative or person holding an office of trust or profit under the United States, shall be appointed an elector.⁵

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with them.

⁵ Art. II, Par. 2.

selves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.⁶

Is it any wonder that this complicated method of choosing a President should have broken down? It appeared at the outset to be quite efficacious, since at the first two elections every elector voted for Washington. The election of 1796, however, showed no such unanimity, for thirteen men received electoral votes. As the party system grew up, the unmanageable scattering of votes was superseded by the device of having the electors vote for party candidates. This device, which came into operation as early as 1800, was the beginning of a system absolutely not contemplated by the Constitution; for thereafter the members of the Electoral College, instead of exercising independent judgment, became little more than rubber stamps of some political party. Since the choice of electors by popular vote has become universal,⁷ election by a selected group of supposedly

⁶ Amendment XII, September 25, 1804, Par. 1.

⁷ "From 1832 onwards the legislature elected only in South Carolina, and there only until the Civil War. Florida, in 1868, and Colorado, in 1876, reverted temporarily to legislative election." F. A. Ogg and P. O. Ray, *Introduction to American Government* (New York, 1931), 4th ed., pp. 243-244.

wise and independent men has been transformed into a hybrid system of popular election without the redeeming features of a direct popular election.

With the rise of political parties, some method of nomination was found necessary. The congressional caucus, which was the first method of choosing nominees, soon gave place to the nominating convention. There was much dissatisfaction with the first system, because it was regarded as an assumption of power by the party members in Congress, which was unfair to the States where the party was not strong enough to win any congressional seats. Some critics felt that this system was tantamount to permitting the legislature to select the President. When in 1824 the congressional caucus of the Democratic Party nominated the relatively obscure William H. Crawford for President, the unfavorable reaction was so strong that the congressional caucus system ceased to be employed. Its place was soon taken by the national nominating convention. The National Republican Party held a national convention in 1831, and the Democratic Party held a national convention in 1832. By 1840, the national convention had become the accepted method of nominating candidates for the Presidency and of declaring party principles and programs. It has continued in use to the present day. Although it is criticized severely because of its undignified character, no other method of nomination seems likely to supersede it in the immediate future.

When the candidates have been chosen and the platform, or statement of party principles and policy, has been drafted and adopted, the electoral campaign begins. All possible devices and stratagems are used to secure votes. The aid, financial and otherwise, of the most varied types of organizations is solicited. The State and the local party machines are "greased into running order" by funds from the national party treasury.

Although the campaign is congressional as well as presidential, nearly all the effort of the party is given to the latter aspect. There are several reasons for this. One is, that only the President and the Vice President are national figures. Another is, that their unique position is more striking to the imagination than is a position in Congress, shared by so many

other persons. The motive of economy is also present. The same speeches and documents, printed in large quantities at small cost, can be circulated with much less expense than would be involved if similar publicity were attempted for persons who seek election as members of Congress. Moreover, as a rule, though not necessarily, a vote for the party's candidates for President and Vice President (that is, a vote for the electors who will cast their ballots for these men) is also a vote for the party's loyal candidates for Congress, since the vast majority of voters mark a "straight party ticket" on their ballots. One very important reason for the emphasis on the candidate for President is the fact that he has so much patronage at his disposal. It is the hope of being rewarded with a public office that leads to much effort in his behalf.

When the popular election for presidential electors is finally held, in November of every fourth year, it ends several months of intensive campaign work by all parties. As soon as the ballots are counted, it is known who will be the next President, since the electors of each party are pledged to vote for its chosen candidate, and the choice of the former is in effect a vote for the latter. The Electoral Colleges meet and vote in their respective states and the results are transmitted to the President of the Senate, who opens and counts them, with due ceremony, in the presence of the Senate and the House of Representatives; and the election of the President of the United States is formally declared.⁸

THE PRESIDENT OF FRANCE. The President of the French Republic is chosen in the manner provided by Article 2 of the constitutional law of February 25, 1875, which reads as follows: "The President of the Republic is elected by an absolute majority of votes, by the Senate and the Chamber of Deputies united in a National Assembly. He is elected for seven years. He is reeligible."

When a President is to be elected, the two Chambers meet in National Assembly for this purpose at Versailles, under the

⁸ It is well known that the majority of popular votes may be so distributed that it does not secure a majority of electoral votes. See Ogg and Ray, *op. cit.*, pp. 244-247, for this and other rare but not unknown contingencies.

chairmanship of the president of the Senate, or in his absence, of one of the vice presidents. Even if the president of the Senate is a candidate for the National Presidency, he presides over the Assembly; but in case he is elected he is excused from announcing this fact, which is proclaimed by the person ranking next in office.

The National Assembly is summoned by the President whose term of office is expiring, at least one month before this period ends. Should the summons not be issued, the Assembly meets of its own right on the fifteenth day before the expiration of the term. If the office becomes vacant prematurely for any reason, the Assembly convenes at once, and elects a person to fill the vacancy. Two or three days is the average period that France has been without a President under such circumstances. During this short interval, the Cabinet exercises the presidential functions.

The National Assembly presents the greatest possible contrast to the American political convention. It is composed of men representing many different parties, who must agree among themselves sufficiently to cast a majority of votes for one person. Neither any candidate for the Presidency, nor his friends and political supporters, can carry on a public campaign. No prescribed length of time elapses from the day when one President dies or resigns, until his successor is chosen; or, if the Assembly meets because the end of a President's term in office is approaching, the country is not long in suspense over the identity of the next incumbent. The bands, flags, cheers and parades which accompany the American convention are conspicuous by their absence; and it would be considered an offense against the dignity of the Assembly and of the French Republic, should the friends of any candidate endeavor to introduce such demonstrations.

It is generally understood beforehand, what particular men have reasonable aspirations to the Presidency, and there are undoubtedly certain arrangements worked out among various political parties, in regard to the support which these candidates may expect. The party organization, though powerful, is nearly always rather tractable in this respect; at least suffi-

ciently so to enable a majority of votes to be obtained for some man whose valuable public services appear to suggest him as the logical incumbent of the presidential office.

Although occasional objections have been made to this method, largely on the ground that it is undemocratic, it eliminates some of the faults of the American system. There is, moreover, no real lack of democracy when the representatives of the people, who should control the administration, select its head. Under this system, the attention of the people can be centered upon electing the policy-determining body, rather than the President, who is in no sense a policy-determining organ.

The question may well be asked, whether the United States might advantageously adopt the French method of choosing the national President. This question should probably be answered in the negative. The fact has been mentioned that the various political parties in the National Assembly of France are always able to reach a sufficient basis of agreement to make possible the election of a President. This can be done only because the powers of the President are really exercised by the Cabinet, so that the President is little more than an honorary figure, a nominal Chief of State. In case he were the active head of government and administration, with powers such as are given to the President of the United States, a majority vote of the Assembly could not be achieved without the utmost difficulty, since parties are numerous and partisan feeling is intense. Unless the United States should so curtail the powers of its President as to remove from his control the direction of the administration, it may admire the simple, rapid, inexpensive, and dignified manner in which the President of the French Republic is chosen, but may not wisely consider adopting it.

Relation of the Chief of State to the Legislature: Powers in Respect to Legislative Sessions

- ✓ THE UNITED STATES. The President has quite restricted powers in respect to sessions of Congress. The Constitution requires Congress to: "assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January,

unless they shall by law appoint a different day." Although this provision makes it unnecessary for the President to call regular sessions of Congress, even as a matter of form, he "may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he may think proper." It will be seen that the President's power in respect to adjournment is confined to a single contingency. This power has never been exercised. The power to call special sessions, on the contrary, is often used. The President has no right to prorogue or to dissolve either or both of the Houses of Congress.

FRANCE. The President of the French Republic may convene the legislature, and must do so for extraordinary sessions, if a majority of the members of the two Chambers request this action. As in the United States, the right to call an extra session is quite often exercised. The President may call the regular session at a date earlier than that fixed by the Constitution. Each session is formally closed by a presidential decree. This means nothing in practice, since the date is always set by agreement between the Chambers and the Cabinet. During the World War, for about four years (1915-1918), no decree of cloture was issued and the Chambers were continuously in session.

During any regular session, the President may adjourn the Chambers, for a fixed period not to exceed one month. Adjournment may not take place more than twice in the same session. Since there is no constitutional limitation as to the reasons by which such action must be guided, the power of adjournment of the President of France appears on the surface to be wider by far than that of the President of the United States. It was the hope of those who wrote the Constitutional Laws of the Third Republic⁹ that the power of adjournment might help to end "deadlocks" and other parliamentary crises.

⁹ See Speech in National Assembly by M. Laboulaye, *Annales de l'Assemblée Nationale* (Paris, 1875), Vol. XXXIX, p. 222; also A. Matter, *La Dissolution des Assemblées parlementaire* (Paris, 1898), Chs. III, VII, and conclusions.

by giving the members of the legislature time to study the views of their constituencies, by providing an interval for cool thought and the subsidence of passions, and by opening an opportunity for the clear and firm expression of public opinion.

The right of dissolution bestowed upon the President of the Republic applies only to the Chamber of Deputies. The law says: "The President of the Republic may, upon the advice of the Senate, dissolve the Chamber of Deputies before the legal expiration of its term."¹⁰ The theoretical purpose of dissolution in France is to appeal to the people when insoluble conflicts arise between the government, which believes itself to have the support of the country, and a hostile Chamber of Deputies. In order to prevent the President from instituting a personal government for a long time without parliamentary control, new elections for the Deputies must be held within a period of two months after dissolution takes place, and the Deputies must convene within ten days after the elections.¹¹

The only occasion on which a President of the French Republic exercised the prerogatives of adjournment and dissolution made these institutions so unpopular that no President has since ventured to employ them. In 1877 President MacMahon forced the resignation of a cabinet which possessed the confidence of the Chamber of Deputies. The new Cabinet, which shared the political views of the President, was not acceptable to the Chamber. The President hoped to subdue the Chamber of Deputies by employing the power of adjournment; but when the legislature met again the Deputies still refused to accept the President's choice of a ministry. MacMahon, therefore, dissolved the Chamber of Deputies with the consent of the Senate. The subsequent elections were marked by great excitement, and the President and his supporters used much pressure upon the voters, but the new Deputies were still antagonistic to MacMahon. The Cabinet was forced to resign; a new Cabinet was unable to secure support, and finally the President was compelled to alter his tactics. The affair ended in his resignation some time afterward.

¹⁰ Constitutional Law of February 25, 1875, Art. 5.

¹¹ Constitutional Law of August 14, 1884, Art. I.

The French President may not prorogue the Chambers, that is to say, suspend their meeting for an indeterminate duration. The law gives him only the right of adjournment; hence the right of prorogation does not exist.¹²

ENGLAND. The King of England, or, more accurately, the Crown, formally convenes and prorogues Parliament. It is customary for the King to go in person to open a new session with colorful ceremonies. A royal proclamation also dissolves Parliament and orders that another House of Commons be elected. Although the appearance of power is thus retained by the Crown, the use of power is governed by the exigencies of the political situation; for Parliament always is convened, prorogued, and dissolved, upon the advice of the King's ministry.

Powers of Chief of State in Respect to Legislation

✓ THE UNITED STATES. The President's constitutional powers over legislation are two in number. In the first place, it is his function to inform Congress concerning the state of the Union, and to recommend measures for its consideration. In the second place, he has the power to approve or to veto laws which Congress has enacted. Congress is in no way obliged to take any action upon the President's recommendations in respect to legislation. In fact, it has the right and the power to take action diametrically opposed to that which the President has suggested. If, however, the President is a strong personality and has the confidence of the country, it may be possible for him practically to force the hand of Congress and to secure such legislation as he recommends. As the leader of his party, it may also be possible for the President to initiate a program which Congress will follow, particularly if he has the support of a large majority in both houses of Congress.

A much more effective power than the right to inform and to recommend is the power to sign or to veto bills. The Constitution requires that every bill passed by both Houses of Congress "shall, before it becomes a law, be presented to the

¹² Constitutional Law of July 16, 1875, Art. 2, Sec. 2.

President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. . . . If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."¹³

There is no possible doubt about several contingencies covered by the above provisions. Clearly the President, when a bill passed by both Houses lies before him, can (1) make it a law by signing it, (2) return it to the House where it originated, with his objections, thus vetoing the Act unless it is repassed in both Houses by two-thirds majorities, or (3) take no action in regard to it, in which case the bill becomes law after ten days, if Congress is still in session. Several reasons may influence the President to choose the last-named alternative. He may disapprove of the bill, yet realize that he would suffer a political defeat in seeing it repassed if he should return it to Congress; he may approve of it in his personal capacity, but feel unwilling to antagonize certain party or other interests by attaching his signature to it; or he may be uncertain as to its probable effects or even as to its constitutionality—in short, he may desire to avoid any personal assumption of responsibility.

Certain doubts have arisen in connection with the President's rights of action upon bills passed during the last few days of a session of Congress, and laid before the President less than ten days before the session ends. In the *Pocket Veto Case*, decided in 1929,¹⁴ the Supreme Court brushed aside the ingenious suggestion that the word "adjournment" in the constitutional provision quoted above does not refer to the adjournment of every session of Congress, but only to the final adjournment of each Congress. This and other arguments

¹³ Art. I, Sec. 7. Repassage by a two-thirds majority in both houses makes the bill a law.

¹⁴ 279 U. S. 655, 49 S. Ct. 463, 73 L. Ed. 894 (1929).

were refuted in such language as to make it perfectly clear that no bill which has not been in the hands of the President ten days (Sundays excepted) while Congress is actually sitting, can become law without his signature.

But there is another contingency. If the President signs certain bills within ten days after he has received them, but if Congress has adjourned in the meantime so that it is not in session when the President's action is taken, do these bills become law? President Taft thought not; President Wilson took the opposing view, and signed eight bills after the adjournment of Congress. His action has been followed by succeeding Presidents but there has been no definite decision by the Supreme Court as to its constitutionality.

Several results are accomplished in respect to laws by the President's power to approve or disapprove: (1) This arrangement places the opinion of one man, who perhaps has not given the matter very serious thought, above the joint action of many men who have based their decision—theoretically at least—upon evidence, argument and discussion. (2) It makes for the irresponsibility of Congress; since if Congress knows that the President will veto a measure, it may pass the measure in question merely to please and impress certain constituents, feeling mistakenly that no harm will be done in the end since the bill is not actually to become a law. (3) For both the reasons given above, the system undermines the prestige of Congress. (4) It often prevents the embodiment into law of a strong public opinion.

FRANCE. The President of the French Republic has the right to request a vote of the Chambers in favor of revising the Constitution. This right has been exercised several times.¹⁵ The President may also return a bill to the Chambers with a message supporting a demand for revision. This right, however, is of no practical value, as under a parliamentary system it is almost inconceivable that he can ever make any effective use of it. ✓

¹⁵ L. Duguit and H. Monnier, *Les constitutions et les principales lois politiques de la France depuis 1789* (Paris, 1925), 4th ed., CLXI; F. Moreau, *Précis élémentaire de droit constitutionnel* (Paris, 1921), 9th ed., pp. 445ff.

The President may send messages through the ministry to the Chambers.¹⁶ This right was exercised by Thiers and MacMahon; but except for messages expressing appreciation of election to the presidential office, and other polite and innocuous communications, it was not used by any other Presidents until the World War. It is not quite clear whether the writers of the constitutional laws intended to give the President such a power as that bestowed upon the President of the United States, or such as that which the "King's Speech to Parliament" expresses in England. Whatever their intention may have been, since the President is politically irresponsible these messages could do little but represent the views of the ministry. In countersigning them and in reading them from the tribunal, the ministers assume responsibility for them.

In France, which differs in this respect from both the United States and Germany, the President has the right of initiating bills, concurrently with the members of the Chambers.¹⁷ He may also appoint commissioners to represent the ministry in discussing a bill in Parliament.¹⁸

He promulgates the laws within a month after their passage, or within three days in the case of laws which have been declared urgent by the express vote of each Chamber. He has no veto power; but during the month which may precede promulgation, he may send a message to the Chambers demanding a new discussion of the law, and giving his reasons for so doing. This request cannot be refused.¹⁹

ENGLAND. The King of England had a real and immediate power to issue commands which had the force of law, until Parliament became the dominating factor in British government. This power was withdrawn from the Sovereign little by little, so that today the Crown, apart from Parliament, has no power to make, suspend, repeal or alter the laws anywhere outside of the colonies; and even there his power is nominal rather than real and personal. Technically, however, the law-

¹⁶ Constitutional Law of July 16, 1875, Art. 6, Par. I.

¹⁷ Constitutional Law of February 25, 1875, Art. 3, Par. I.

¹⁸ Constitutional Law of July 16, 1875, Art. 6, Par. 2.

¹⁹ *Ibid.*, Art. 7.

making power is vested even today in "the King in Parliament"; and statutes are made "by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same."

In practice, the Sovereign is seldom consulted about matters of legislation and policy until the Cabinet has formed its opinion. Although he may be informed in general terms of what is being done at Cabinet meetings, yet legislation is commonly talked over and agreed upon by the ministers before it is submitted to the King for approval. The extent to which the Sovereign is consulted, and the amount of actual influence upon policy which he may have, cannot be stated in an exact formula. These things vary from Sovereign to Sovereign, from Cabinet to Cabinet, and even from bill to bill. But in the last analysis, when a Cabinet supported by Parliament has prepared a bill, and Parliament has passed said bill, the King must sign it. No bill passed by Parliament becomes a law until it has received the royal consent; but such assent has not been denied for more than two hundred years. ✓

CHAPTER X

THE POWERS OF THE CHIEF OF STATE

In no field do the differences between the actual powers of the Chiefs of State in various countries display themselves more strikingly than in that of public administration. The range of power here varies, it is scarcely hyperbolic to say, from zero to infinity. This is true even among states, such as France and the United States, which have a strong external resemblance, in that each one is a Republic, with a President as its highest officer.

Powers of Chief of State in Respect to Administration

THE UNITED STATES. The President has more real administrative power than does the chief executive of any other important country. He has the power to appoint heads of departments almost without reference to their support by Congress. These officers constitute the President's Cabinet or political advisers, and as such are primarily responsible to the President, not to the legislature. It is true that the appointments are made subject to the consent of the Senate, but this is rarely refused. The President, therefore, is the active chief of a vast administrative organization. But his powers do not end here. The President is responsible for the appointment of nearly 16,000 persons within this great administrative machine, who are not subject to the ordinary rules of the civil service. Furthermore, there are nearly fifty detached boards, commissions, administrative tribunals and so on, whose members are appointed by the President.

FRANCE. The President of the French Republic is charged by the Constitutional Law of February 25, 1875 with the duty of watching over and securing the execution of the laws. According to French constitutional theory this makes him a

part of the government. By presiding over the meetings of the Cabinet, and there expressing his opinion, he may have a certain influence upon administrative action. "It is true," says Duguit, "that there may be and often are deliberated in the council of the ministers, under the President of the Republic, the instructions which each minister addresses verbally or by writing to the officials in his department, upon the individual measures to be taken in the application of such or such law. In this sense, in effect, one may say that the government personified by the President supervises and assures the execution of the laws. In reality, it is each minister who, under his responsibility to the Chambers, gives the orders to the officers placed under his direction."¹

The President of France appoints to all civil and military positions.² But, however, this comprehensive right is modified by various laws which specify qualifications for office; which bestow certain powers of appointment elsewhere, as upon Prefects and mayors; and which provide for the filling of specific positions by election, particularly in the advisory administrative bodies of the departments and communes.

ENGLAND. The British Sovereign, from the formal and theoretical standpoint, carries on the work of government by means of officers whom he appoints.

No Minister or high official, civil or military, may legally perform any function until the seals of office have been transferred to him by the King, or he has received a deed of appointment with the King's sign-manual. The king, with the Ministers whom he appoints, constitutes the Government, and the Government is responsible for the maintenance of order, for the administration of dependencies, for the execution of all laws, and for the conduct of . . . relations with all other States, including the making of treaties, and, if need be, the declaration of war.³

As a matter of practice the King does not wield these vast powers himself, but acts only through ministers who are im-

¹ L. Duguit, *Traité de droit constitutionnel*.

² Constitutional Law of February 25, 1875, Art. 3, Par. 4.

³ Ramsey Muir, *How Britain is Governed* (New York, 1932), p. 10.

posed upon him by Parliament. It is really the ministers who exercise the powers.

According to Bagehot, the Sovereign has three rights—the right to be consulted, the right to encourage, and the right to warn. Through these he may exert some little influence upon the government. Although the King does not, like the President of France, attend Cabinet meetings, he is kept in rather close touch with the Prime Minister. At times the King can influence foreign policy through such methods as entertaining foreign dignitaries, carrying on personal correspondence with the heads of foreign states, calling conferences, or even sending the heir apparent to visit the colonies. Although the Cabinet does not have to take the advice of the Sovereign on any point, it will often wish to do so. If the King is a man of good natural abilities, he may be of great help to the Cabinet because of his unequalled experience. After he has been intimately associated with several Prime Ministers and Cabinets, he should know more in certain ways than any man among them. Moreover, as Shaw has wittily demonstrated in *The Apple Cart*, because of his secure position and his social prestige the Sovereign can take a much more objective attitude toward political questions than can a minister with a strong partisan bias; the former may then be able to influence the latter in the direction of moderation and reason. When all is said and done, however, and despite certain dissenting views, the best opinion still holds that in England “the King reigns, but does not govern.”

The Ordinance-Making Power of the Chief of State

THE UNITED STATES. “Few people are aware of the great extent to which public administration in the United States national government is controlled by means of administrative regulations or orders, in the nature of subordinate legislation.”⁴ It has been held by the Supreme Court in many cases that the President has no sub-legislative power, and that his power to issue orders is executive and administrative in nature,

⁴ John Fairlie, “Administrative Legislation,” *Michigan Law Review* (January, 1920), Vol. XVIII, No. 3, pp. 181-200.

arising from his duty to see that the laws are carried out. (✓)
Various important scholars who disagree with this viewpoint maintain that there has developed

a constitutional practice which is comparable in character if not in degree with what is known on the continent of Europe as executive ordinance making. What the Supreme Court has denied, moreover, is not the authority of the Chief Magistrate in respect to this practice, but merely the fact that the powers so exercised are legislative. It has preferred to call them administrative. In thus refusing to call a spade a spade the Court has sought to allow the needed flexibility in governmental arrangements without admitting that Congress can devolve its constitutional powers upon the Executive.⁵

Many substantially sub-legislative acts are issued by the heads of the various departments, such as the Secretary of Labor in respect to immigration, the Department of the Interior in respect to public lands, and so on; but these are regarded as acts of the President and consequently are not recognized by the courts as sub-legislative.

The President speaks [said the Supreme Court] and acts through the heads of the several departments in relation to the subjects which appertain to their respective duties. . . . We consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President.

The President may act through the head of the proper department in issuing most ordinances which he may be authorized by statute to issue; and in such cases the act of the head of the department is the equivalent in law to the act of the President.⁶

But the President himself promulgates

the Consular Regulations, the Civil Service Rules, and the Army and Navy Regulations, together with rules for the patent office and the customs and internal revenue services. In some cases he acts upon express statutory authority; in others his authority

⁵ James Hart, *The Ordinance Making Powers of the President of the United States* (Baltimore, 1925), p. 18.

⁶ *Wilcox v. Jackson*, 38 U. S. (13 Pet.) 498, 10 L. Ed. 264 (1839).

is implied from the nature or tone of the law to be executed; in still others he proceeds under sole warrant of the Constitution.⁷

Although the President exercises such vast powers, equivalent to powers of sub-legislation, he is not restrained by any controls comparable to those which limit the actions of the President of France or the King of England.

It should be patent that any political control over a President on the part of the people is an absurdity, even during his first term when he hopes for renomination, for the people do not understand the significance of sub-legislation. Moreover, unless it so happens that certain individuals are definitely affected by certain acts, they probably never know that such acts exist. The situation is even worse during the second term, when the President is to all intents and purposes absolutely irresponsible even to the people. Not only is political control thus ineffective, but the President in issuing sub-legislation is not in any way under the control of a ministry, as is the President of France or Germany, whose every act must be countersigned by a minister, ministers, or even the whole Cabinet. Although it is conceivable that a President might be impeached for misuse of the ordinance power, this is highly improbable, since it is almost impossible to impeach an executive even when guilty of crime and corruption, much less so when guilty merely of going beyond the authority given him by the Constitution or the laws.

There is, furthermore, no satisfactory way of controlling the President of the United States by judicial process. The courts, until recently, have been reluctant to interfere with any official act performed by the President; and courts cannot properly control executive discretion. If an act is executive in nature, and is in accordance with law, the courts should refuse to intervene on the ground that the separation of powers established by the Constitution leaves the executive free within his own sphere.⁸ The Supreme Court went so far as to declare

⁷ Hart, *op. cit.*, p. 186.

⁸ *Kendall v. United States*, 37 U. S. (12 Pet.) 524, 9 L. Ed. 1181 (1838); *Meriwether v. Garrett*, 102 U. S. (12 Otto) 472, 26 L. Ed. 197 (1880); *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887).

that a law passed by Congress, providing that the removal of certain classes of postmasters shall be the function of the President, "by and with the advice and consent of the Senate," is "unconstitutional in its attempt to make the President's power of removal dependent upon consent of the Senate."⁹ In a more recent case, the Court somewhat changed its position and held the President limited by law in the removal of officers other than executive officers.¹⁰ It has also declared unconstitutional the National Industrial Recovery Administration Act, on the ground that by this law "legislative power is unconstitutionally delegated" to the President.¹¹ Any extensive control of the President's acts by the courts, however, is most unlikely.

It is certainly possible for Congress to limit the ordinance-making power so specifically that the President will scarcely venture beyond the boundaries set; but such a step is not feasible, for it throws upon Congress a vast amount of detailed work that it is unable to do well, and complicates large legislative policies with masses of detail which might better be handled by the President or the appropriate department head. Moreover, Congress is not in a position to make detailed regulations, since it is not intimately acquainted with administration. A rule or order is far better than an act of Congress from the standpoint of administration, since if the former fails to bring about the proper administrative results it may be altered without delay, whereas repealing or amending a law is usually a slow process.

As the work of administration becomes more complex, this deficiency in our political organization will undoubtedly become more pronounced. It is difficult to see how it can be corrected, so long as the Cabinet is not responsible to the legislature.

ENGLAND. The prerogative of the Crown to make proclamations which had the effect of law was claimed by Sovereigns down to the Revolution of 1688. Later, the constitutional

⁹ *Myers v. United States*, 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926).

¹⁰ *Humphrey's Executor v. United States*, 295 U. S. 602, 55 S. Ct. 689, 79 L. Ed. 1611 (1935).

¹¹ *Schechter Poultry Corporation v. United States*, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935). See also the *Hot Oil Case*, *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).

principle was recognized that laws could be made only by or with the express authority of Parliament. It was soon found necessary for Parliament to delegate the actual exercise of subsidiary law making to the Crown. Thus statutory orders developed, that is, orders issued by the Crown under statutory authority. This power was granted to the Crown very sparingly indeed, during the eighteenth and even the early part of the nineteenth centuries. However, with the development of governmental regulation and control that took place soon afterward in respect to poor relief, factory inspection, mine inspection, labor regulation, public health, transportation, education, and so on, it was found convenient, if not absolutely necessary, to delegate a large amount of minor legislation in regard to such matters to the Crown.¹²

The measures taken under this kind of delegation are called "Orders in Council," since they are supposed to be issued by the King sitting with the Privy Council. The source of these orders is really "in effect, though not in form or theory, the cabinet."¹³ The Orders in Council are very numerous at present, averaging nearly two per day throughout the year. Many of these orders originate with departments and come from them fully drafted, while others are presented only in outline and must be put into shape by the drafting experts in the office of the Privy Council.

A comparison in [almost] any year of the bulk of the annual volume of Statutory Rules and Orders, closely printed on thin paper, with the bulk of the volume of Statutes, the print widely spaced and the paper thick, gives some idea of the disparity. Mr. Baldwin's average figures for 1926-1929 were 50.6 statutes passed and 1408.6 rules and orders; an Act of Parliament was amended, adapted, extended, or otherwise affected by a statutory

¹² See F. A. Ogg, *English Government and Politics* (New York, 1930), p. 201; C. T. Carr, *Delegated Legislation* (London, 1921); J. A. Fairlie, *Administrative Procedure in Connection with Statutory Rules and Orders in Great Britain* (Urbana, Illinois, 1927); Sir Josiah Stamp, "Recent Tendencies Towards the Devolution of Legislative Functions to the Administration," *Journal of Public Administration* (January, 1924), Vol. II, No. 1, pp. 23-38; Harold Potter, "Legislative Powers of Public Authorities," *Public Administration* (January, 1928), Vol. VI, No. 1, pp. 32-40.

¹³ Ogg, *op. cit.*, p. 94.

rule or order in eighty instances during 1921 and in sixty-six instances during 1930. It must be remembered too that ministerial orders of a local character are not always printed: during 1921, 1400 orders of this type were made, in 1922 [a thousand], approximately half of which were printed.¹⁴

In a few instances the clauses which authorize the issue of such orders provide that they shall "lie on the table" for perhaps twenty or forty days, so that Parliament may have an opportunity to discuss them, and that they may become valid law after the expiration of this time only if no challenge has been made. Possibly more often the statutes provide that they shall go into force at once, and nevertheless "lie on the table" for a period. In this case, if within a specified number of days either House takes exception to an order and presents an address to His Majesty, the objectionable order may be nullified by an Order in Council. In a majority of cases there is no provision at all for "lying on the table." The signature of "the Minister" is enough to give orders in Council the force of law.

The extent to which such delegation may go is demonstrated in the Rating and Valuation Act of 1925. By this Act the minister was not only given power to issue orders,¹⁵ but was further empowered to "do any other thing which appears to him necessary and expedient for the purpose in view." It was provided, moreover, that "any such Order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient for carrying the Order into effect." Similar provisions are contained in the Unemployment Insurance Act of 1920.¹⁶

Theoretically, the members of the Privy Council are responsible to Parliament, and must always act in such a way as to retain its support. There is good reason to doubt, however, whether this control is as effective in reality as it sounds in theory, since the Cabinet, as long as it is in power, takes the

¹⁴ John Willis, *The Parliamentary Powers of English Government Departments* (Howard University Press, 1933), p. 33.

¹⁵ *Halsbury's Statutes of England* (London, 1930), Vol. XIV, p. 686, Art. 67.

¹⁶ *Ibid.*, p. 659, Art. 6.

leadership in Parliament. Furthermore, the members of Parliament as individuals lack time, inclination, or ability to check up on the multitude of orders concerning which they know very little. The same thing is true as to the occasional requirement that orders be confirmed by Parliament. Very seldom has Parliament an understanding of detail equal to that possessed by the executive.

A control of which little is heard, but which should not be overlooked, is that exercised by the very highly trained and expert administrators. Despite the widespread idea that the administration should be controlled but should not control, in practice the expert knowledge of the high permanent civil servants, and the excellent standards of public morality in the administration, serve as a valuable controlling influence over sub-legislation.

Finally, there is judicial control, for orders do not enjoy the immunity in this respect possessed by statutes. Any court, whether high or low, before which the question is raised as to the validity of an order, may hold such order *ultra vires*, as not authorized by statute, and may refuse to apply it in the given case. The court does not, however, as does the Council of State in France, have the right to declare such act null and void. It may merely refuse to apply the order in the concrete case, as may the ordinary courts in France.

FRANCE. The President of the French Republic has the right to issue decrees. These are acts "by which the President, exercising one of his constitutional powers, makes a decision which is legal, executory, and obligatory."¹⁷ As a rule, decrees fall into two classes: general or regulatory decrees, often called orders or regulations; and special or individual decrees, such as appointments to office, dismissals, and so on.

The regulatory decrees are further divided into ordinary regulatory decrees, sometimes called simple regulations, and decrees in the form of regulations affecting public administration. The ordinary regulatory decrees are issued under the

¹⁷ A. Esmein, *Éléments de droit constitutionnel français et comparé* (Paris, 1921), 7th ed., Vol. II, p. 64.

President's general power to look after the laws and to see that they are properly executed. Such decrees therefore require no special legislative authorization, and no action of the Council of State; although in many cases the Council of State as a matter of fact does prepare the ordinary regulatory decrees for the President. These decrees may fill in the details of a law, or they may regulate a matter within the executive realm concerning which no legislative action has been taken, particularly in respect to the administration of the public services. The President is said to make such decrees spontaneously.

Regulations affecting public administration, on the other hand, can be issued only by virtue of an express legal authorization. The Council of State must be consulted before such decrees are issued. The President, or the minister through whom the President acts, is not in any sense bound to follow the advice of the Council of State, since this would destroy the ministerial responsibility. In many instances special limitations are placed by law upon the issuing of these decrees, such as the requirement that the decree shall be issued in the Council of Ministers. For example, a law of August 5, 1914, provided that for the duration of the war the government was authorized in the general interest, by decree in the Council of Ministers, to take all measures necessary to facilitate the execution or to suspend the effects of commercial or civil obligations. Two reasons may be advanced for such a limitation. First, it carries the assurance that the policy initiated will not be merely the policy of one man or department, but that of the Cabinet as a whole. Then, it fixes responsibility definitely on the Cabinet.

By a decision of the Senate-consult of May 3, 1854, which is still valid, the President may issue regulations for the government of colonies, on all matters to which the laws of the mother-country have not been made applicable by a vote of the legislature. Such regulations are not considered as legislative provisions, and are therefore subject to the control of the Council of State to the same extent as are similar regulations which apply to France proper.

The French President also uses the regulatory power in declaring a state of siege. This will be explained later.

All decrees of the President are subordinate to law, and are subject to the limitation that they may not supplant, infringe upon or modify the existing laws. Although simple regulations must not impose any limitations upon persons or property not already contained in the law, regulations affecting public administration may do so if they remain within the boundaries fixed by the laws upon which they are based.¹⁸ Decrees which are issued in the proper form, in conformity with the legislative mandate, and within the limits set by law, have the same effects as law and are equally binding and enforceable by the courts.

How are these vast powers of subsidiary lawmaking controlled? The first controlling factor is ministerial responsibility. Since the President can issue such decrees only with the countersignature of a minister of the Cabinet, Parliament can hold the Cabinet strictly responsible for them. Again, in case a decree has been issued illegally, or in excess of power, the individual has two roads open. He may petition the President for its revocation, or as the saying is, he may proceed by the "gracious" appeal. The usual way, however, is to request the Council of State to annul the decree.¹⁹ The individual may prefer to defend himself before a judicial court in which he is charged with the violation of some provision of the decree, on the ground that the decree is illegal.

In the request to the Council of State the petitioner may claim that the decree is invalid for fault of form, excess of power on the part of the President, abuse of power, or violation of a rule of law. If the Council of State agrees with such a claim it annuls the decree. When the case comes up before the judicial tribunals they do not annul the decree even though they consider it invalid; they merely refuse to apply it.²⁰

CONCLUSIONS. Conclusions regarding the ordinance power of the Chief of State must be drawn with caution. Experience has shown that some such power is needed in order that minute

¹⁸ See R. Foignot, *Manuel élémentaire de droit administratif* (Paris, 1921), 13th ed., pp. 48ff.

¹⁹ Law of May 24, 1872, Art. 9.

²⁰ See Aubry and G. Rau, *Cours de droit civil français* (Paris 1897-1922), 5th ed., Vol. I, Sec. 5; P. Dareste, *Les Voies de recours contre les actes de la puissance publique* (Paris, 1914), Ch. IV.

and technical details may receive proper attention, and in order that changed conditions may be met with flexible administrative arrangements. The legislature cannot well do more than lay down the law in its broader outlines; nor should it do more, lest it impede the work of administration by making detailed arrangements which are not adapted to this work, or which are faulty or cumbersome. Yet, when the law has established the outlines, they must always be filled in. France and England bestow upon the Chief of State a good deal of power to issue ordinances and decrees, within the limits set by the statutes. Such ordinances have the force of law, and will be applied by the courts as law. There is no danger of tyrannical or arbitrary use of this power, since it is not general, original, or absolute, and since it is always in reality exercised by the Cabinet, which is directly responsible to the legislature. In the United States, since there is a theoretical separation between the executive and the legislative authorities, such delegation of power is not supposed to take place. In practice, however, it has taken place, and of necessity must take place to quite a large extent, since Congress has delegated power of this kind to the President and the courts have very obligingly refused to call it legislative power. By naming it quasi-legislative or administrative power, they have been able to preserve the fiction that the fields of the legislative and the executive are entirely separate. The situation has been complicated by the fact that in many instances, this sub-legislative power has been delegated to independent boards and commissions. Here again, by the use of ingenious nomenclature, the Courts have permitted important delegations of sub-legislative power to be effected.

It is the consensus of opinion that under modern conditions sub-legislative powers must be delegated. The important questions, then, are: By whom are these powers to be exercised? Under what conditions shall they be delegated? What forms shall they take? How shall they be controlled?

There is a good deal to be said in favor of delegating sub-legislative or ordinance power to the Chief of State, who, because of the dignity, permanency (at least relative to Cabinets and legislatures), and conspicuousness of his position, and his

relations to both the legislature and the Cabinet, seems the logical authority to exercise it. The argument is advanced by many able persons that at least a formal centralization seems better than a scattering of such power among various departments and special boards and commissions; since it is always possible for a vigilant legislature to watch and control the use of authority by one conspicuous figure; and, again, since centralization will assist in the avoidance of overlapping, duplication, or contradictions and inconsistencies, in the orders emanating from several different sub-legislative authorities. Although it is true that the Chief of State cannot know all the detailed needs of all the departments, yet his ordinances will actually be prepared, and explained to him, by members of the departments concerned, so that there will be a maximum of efficiency and a minimum of duplication.

In the United States, there are many persons who oppose complete centralization of the regulatory power, and believe that certain boards and commissions, which are set up by Congress and are relatively independent of the President, should exercise this power. They argue that many important fields of governmental activity are still in the experimental stage, and that these should not be handled as political enterprises, but rather as public services which need expert knowledge, flexibility, and the possibility of constant adjustment in details. This means that the rule-making power now exercised by such agencies as, for example, the Interstate Commerce Commission and the Federal Trade Commission, should be retained by them. It is hardly necessary to say that, in any case, a large amount of regulatory power will always be exercised by the President, both in the fulfillment of his own constitutional responsibilities, and—either directly or indirectly—in connection with his supervision and direction of the work of the administrative departments. The fear of giving the President more powers of rule-making arises from the difference between his position as head of a Cabinet which is not responsible to Congress, and the honorific position of the Chief of State in parliamentary countries, where the Cabinet is headed by a member of the legislature and is responsible to the legislature.

The use of sub-legislative power is always made subject to certain conditions of form and substance. The content of every ordinance or decree must be in keeping with the law, and may never conflict with a statute except by express permission of the same or a later statute. In all parliamentary countries, ordinances and decrees must be countersigned by a responsible minister. Sometimes the opinion of an advisory agency must be received before an ordinance is issued, and sometimes a certain number of days must elapse after issue, before it becomes effective. Various other conditions may be set. In the United States, Congress cannot restrict or limit the President's exercise of his constitutional powers; but in bestowing upon the President further regulatory powers, it can set conditions affecting their exercise.

The Foreign Relations Power of the Chief of State

THE UNITED STATES. The central government has exclusive jurisdiction over the carrying on of foreign relations, including foreign wars. The national Constitution makes the President the official medium of intercourse between this government and foreign governments. He receives foreign ambassadors and ministers. He nominates, and with the advice and consent of the Senate appoints ambassadors, other public ministers, and consuls. Through the Department of State he carries on all diplomatic correspondence with foreign countries, makes and settles claims against foreign governments, and replies to all sorts of communications which are received from foreign states.

Another very important power possessed by the President is that of recognition or non-recognition of foreign governments. Through this power, the President may encourage or discourage one of the combatants in a war, civil or otherwise, in which the United States has no direct part. He may recognize the independence of certain portions of states or colonies. The refusal or the grant of recognition may lead to grave economic and social consequences, as witness the refusal of the United States to recognize Russia, and its recognition of the Republic of Panama.

In protecting citizens and their property rights in other parts of the world, the President has powers of vast political import. In recent years he has sent an army to the Mexican border, has sent marines to Nicaragua, and has recognized certain *de facto* governments and refused to recognize others, as interest seemed to dictate. In fact the President, short of actually declaring war, may deal with foreign situations almost as he sees fit.

One of the President's most important functions in international relations is that of treaty making. The initiation of treaties lies with the President. Although either House of Congress may suggest that treaties should be made, it has no initiative in the matter. The President may initiate treaties without the knowledge of Congress. Even when a treaty has been completed, he has the full option of submitting it to the Senate, returning it to the other prospective parties for revision, or entirely dropping it.

Before a treaty made by the President becomes binding, however, it must receive the approval of the Senate by a two-thirds majority.²¹ Although the Senate has entirely withheld its consent from less than a score, out of a total of about 650 negotiated treaties, a treaty is seldom ratified in the exact form desired by the President. The Senate may introduce modifications and reservations, amend the treaty until it is nearly unrecognizable, insert interpretations of certain clauses, and otherwise alter the document which it is asked to ratify. In case either the President or the foreign government concerned is unwilling to acquiesce in these changes, the treaty is not completed. While a treaty is under consideration in the Senate, the President may recall it, if conditions have changed so that it is no longer applicable, or if he believes that it will not be accepted by the foreign governments with the changes and reservations placed upon it by the Senate.²² This does not end the President's power, for he must ratify the treaty after it has been passed by the Senate. Even when it has been accepted by the

²¹ See R. E. McClendon, "The Two-Thirds Rule in Senate Action upon Treaties, 1789-1901," *American Journal of International Law* (January, 1932), Vol. XXVI, No. 1, pp. 37-56.

²² J. M. Mathews, *Conduct of American Foreign Relations* (London, 1922), p. 419.

foreign government or governments, he has the right to refuse to promulgate it.²³

In respect to executive agreements, the President has a free hand, in that he does not have to ask the advice and consent of the Senate. Although many of these agreements are of minor importance, many of them may be of almost as great significance as treaties. No legal line of demarcation distinguishes treaties from executive agreements, except precedent. The claim is often made that through executive agreements the President evades the control of the Senate over matters of the same rank of importance as treaties. The relationships of the United States with Santo Domingo in the time of President Theodore Roosevelt, and with Nicaragua from 1911 until a formal treaty was made in 1916, show how much can be achieved by the executive agreement.

GREAT BRITAIN. The powers of the King of England in respect to foreign relations are quite limited. "The Crown has been compared to a wheel turning inside the engine of state with great rapidity, but producing little effect because unconnected with the rest of the machinery. This is no doubt an exaggeration; but the actual influence of Queen Victoria upon the course of political events was small as compared with the great industry and activity she displayed."²⁴ Since the time of Queen Victoria the Sovereign has not gained any power in this direction. Such influence as he possesses is of the personal and ceremonial type.

Foreign affairs in reality are carried on through the foreign office, headed by the Secretary of State for Foreign Affairs. This office performs about the same functions as our Department of State; that is, it gathers information, carries on correspondence with foreign governments, sends instructions to representatives abroad, prepares and negotiates treaties and agreements, and formulates policy. There can be little question that under ordinary conditions the office itself is far more im-

²³ Ogg, *op. cit.*, p. 287, and pp. 288, 289 for criticism of President's treaty-making power.

²⁴ A. L. Lowell, *The Government of England* (New York, 1919), Vol. I, p. 47.

portant than the Secretary of State for Foreign Affairs in the formulation of policy, and infinitely more important than the King.

Like other members of the Cabinet, the Secretary of State for Foreign Affairs must have the confidence of Parliament. Although treaties do not have to be submitted to Parliament for ratification, as a matter of practice most of them are. The position of the Secretary of State for Foreign Affairs is more important than that of the Secretary of State in the United States, as the latter must obey the President in all respects or resign, whereas the former has more independence. Important questions, however, are discussed by the Secretary not only with the Prime Minister, but also with the Cabinet as a whole.²⁵

FRANCE. In France, the nominal and formal conduct of foreign relations is in the hands of the Chief of State, the President. He receives ambassadors of foreign powers. In form, at least, he also appoints the French ambassadors to other countries,²⁶ and gives instructions to the French diplomatic representatives abroad.

According to the Constitution, "The President of the Republic shall negotiate and ratify treaties. He shall acquaint the Chambers with them as soon as the interests and the safety of the State permit. Treaties of peace and of commerce, treaties which involve the finances of the State and those relating to the person and property of French citizens in foreign countries, shall be ratified only after having been voted by the two Chambers. No cession, exchange, or annexation of territory shall take place except by virtue of a law."²⁷ From these

²⁵ See "Reports from His Majesty's Representatives Abroad on The Methods Adopted in the Parliaments of Foreign Countries for Dealing with International Questions," *Cmd. 2282, Miscellaneous No. 19* (London, 1924); D. P. Myers, "Legislatures and Foreign Relations," *American Political Science Review* (November, 1917), Vol. XI, No. 4, pp. 643-684. "A considerable amount of fault has been found with what some people think is and what they call my foreign policy, but which, of course, ought not to be called my foreign policy, because it is quite impossible for any individual foreign minister to carry out a policy which is not also in the main lines, the policy of the cabinet of which he is a member." Sir Edward Grey in *London Times* (weekly edition), January 26, 1912, p. 71.

²⁶ Constitutional Law of February 25, 1875, Art. 3.

²⁷ Constitutional Law of July 16, 1875, Art. 8.

provisions it can be seen that not all treaties need be ratified by the Chambers. It is also evident that treaties which involve military arrangements, alliances with foreign countries, and the like, so long as they do not involve a financial outlay, need not be submitted to Parliament. Thus, the French alliance with Russia and the entente with England just prior to the World War were not submitted to Parliament. According to the covenant of the League of Nations, however, these treaties must now be registered with the Secretariat of the League.

In actual practice, all the foreign relationships, concerning which the President has the nominal power, are carried on by the Minister of Foreign Affairs and the Cabinet. The government is entirely responsible for them through the countersignature. Since the ministers are responsible to Parliament, it necessarily follows that the conduct of foreign affairs is subjected to a far greater legislative control in France than in the United States.

The War Powers of the Chief of State

THE UNITED STATES. The President of the United States is invested by the Constitution with certain powers in respect to war. These represent a division with Congress of powers which the framers of the Constitution thought neither the executive nor the legislature should possess as a whole. It is Congress that declares war, grants letters of marque and reprisal, raises and supports armies, provides for and maintains a navy, makes rules for the government and regulation of the land and naval forces, provides for calling out, organizing, arming and disciplining the militia, and so forth. On the other hand, the President is the commander-in-chief of the army, the navy, and the militia of the several States when called into the federal service. He appoints all regular and reserve officers in the army and the navy. He has considerable power to supplement with detailed regulations the general rules made by Congress. The President can exercise as much authority as he wishes in carrying out campaigns, and theoretically there is nothing to prevent him from taking active command in the field. He can establish military governments in conquered

territories, as was done in the Philippine Islands and other lands acquired from Spain. Until Congress makes different arrangements, he can exercise both legislative and executive power in such territories.

Although the power to declare war belongs to Congress, the President can perform such overt acts as to make war inevitable. He can even carry on hostilities when there has been no declaration of war by Congress. This has happened several times, as when President McKinley ordered the battleship *Maine* to Havana Harbor, although the Spaniards were sure to regard this as an unfriendly act, if not an act of war. Upon the order of President Wilson in 1913, Admiral Mayo captured Vera Cruz although war had not been declared. In 1918 the American troops cooperated in military expeditions against the Bolsheviks via Archangel and Vladivostok, although no formal declaration of war had been made.

During times of war, the President's powers expand almost without limit. Although in legal theory he may not violate the Constitution or the laws, in actual practice he often does so. During our own Civil War, President Lincoln authorized searches and seizures without warrant, suppressed newspapers, declared martial law in territories where the courts were open, and suspended the writ of habeas corpus. Most of these acts were later sanctioned by Congress; but Justice Taney, in a famous opinion, took the position now generally accepted, that no exigency can justify the President in overstepping the provisions of the Constitution.²⁸

During the World War, President Wilson was in a somewhat better legal position than President Lincoln had been, due to the fact that in advance of actual warfare he obtained large grants of authority from Congress. There can be little doubt, however, that during this war both Congress and the President overstepped the boundaries set by the Constitution.

FRANCE. The war powers of the President of France are quite limited. According to the Constitutional Law of February 25, 1875, the President "disposes of the armed forces,"

²⁸ *Ex parte Merryman*, Federal Cases, Vol. 17, No. 9, 487.

that is, the army, navy and police. This provision does not make him the commander-in-chief of the army and navy.²⁹ As to final control over the military forces, the practice varies. During the first part of the World War it was entrusted to the Minister of War. In December, 1915, the armies were placed under the command of a division general called the commander-in-chief of the armies, or in other words, a generalissimo. The decree of December 13, 1916, reduced the commander-in-chief to the rôle of the technical councillor of the government. The decree of December 26, 1916, abrogated the two preceding decrees, and the Minister of War again became the real director of the war, with the technical advice of the Chief Major General of the army. Later decrees practically gave the direction of the war policies to a committee of war, composed of a small number of ministers under the Presidency of the Republic. A decree and a subsequent order provided for the approval by the Council of Ministers of all questions engaging the responsibility of the government.³⁰ Evidently the President of the Republic does not dispose of the armed forces, despite the language of the Constitution. His relation to the army is purely ceremonial, as when he reviews troops, or signs decrees which have been written by those who are actually in command.

Article 3 of the Constitutional Law of February 25, 1875 provides that the President "shall appoint to all civil and military positions." This does not mean that the military officers are actually appointed by the President, for, as a matter of practice, it is the government which makes the appointments.

"The President of the Republic shall not declare war without the previous consent of the two Chambers."³¹ The President is given no real power here. There is no distinction made in any law between the declaration of war and a state of war. In actual practice, however, a distinction seems to be made, for several rather large and important expeditions, such as those carried out in Tunis, Dohomey, Madagascar, China and Morocco, have been undertaken without a declaration of war

²⁹ F. Moreau, *Précis élémentaire de droit constitutionnel* (Paris, 1921), 9th ed., p. 355.

³⁰ *Ibid.*, p. 356.

³¹ Constitutional Law of July 16, 1875, Art. 9.

and thus without the consent of the two Chambers. By voting credits the Chambers have ratified the actions of the government. It must be understood, however, that all the war power of the President is exercised under the countersignature of the ministry, so that even the expeditions mentioned had the tacit consent of the Chambers.

GREAT BRITAIN. The war powers of the King of England are almost non-existent. In theory the King can declare war. In practice, it is the ministry upon which this responsibility falls. The King is not even nominally the commander-in-chief. As early as 1794 a Secretary of State for War was vested with control of the army conjointly with a commander-in-chief. This secretary was made a member of the Cabinet. No sovereign since has had actual power of command.

During the World War, when Lloyd George became Premier a war Cabinet was created consisting of only five persons, one Labor member, one Liberal, and three Conservatives. Since only one of the five held any administrative office, their time and energies were left free for the direction of the war.³² The war Cabinet was increased to six in 1917, with an occasional seventh. In 1919, it was again reduced to five.³³ Throughout its existence it wielded practically supreme power. Parliament gave it a very free hand, and exercised only the most general control over it. The King made no attempt to direct it. There is no doubt that the function of carrying on war, in all its aspects, has ceased to belong to the Sovereign.

Powers of the Chief of State in Suppressing Domestic Violence

THE UNITED STATES. The President of the United States may exercise certain limited powers in the suppression of violence. The federal Constitution provides that the United States shall guarantee to every state a republican form of government and shall protect the States against invasion and domestic

³² For a defense of this Cabinet see E. M. Sait and D. P. Barrows, *British Politics in Transition* (Yonkers, New York, 1925), p. 39.

³³ See H. E. Egerton, *The Committee of Imperial Defense*.

violence. It does not, however, define a republican form of government; but this is generally held to be a representative form of government, one under which the people choose their own governors. Undoubtedly the Constitution-makers sought to prevent the setting up of some sort of monarchical form of government by certain States, perhaps with the aid of foreign powers. At any event, if such a contingency should arise or if invasion were threatened, the President could act immediately without asking the advice or consent of the State authorities. In case of domestic disorder, unless the execution of a national law is threatened, national property is in danger, or the carrying out of a function over which the nation has control is impeded, the President cannot act unless asked to do so. When the State legislature or the governor makes a request for aid, the President can use his discretion in granting or refusing it. Since the United States government does not possess police power, except in respect to the carrying on of its own functions, the President cannot act to restore order when State or municipal authorities fail to maintain it, or to clear up undesirable situations, such as have existed often in the large cities of the country.

It is altogether probable that this field of the President's powers might be greatly extended in case of a serious emergency. For as Congress has legislated with respect to pure foods, drugs, transportation of alcoholic liquor, transportation of women for immoral purposes, and other fields which were certainly not foreseen when the power to regulate commerce between the States was bestowed upon it; just so the President, under the war power, the power to see that the laws are properly executed, and the power to supervise and manage the national administration, might extend considerably his powers in respect to domestic disorders and violence, should circumstances necessitate such extension.

FRANCE. The President of France has no extensive war powers. However, in case of a foreign war, or imminent peril resulting from armed insurrection, a state of siege may be declared. The effect of the state of siege is that the military

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authorities take over the police powers and the powers of maintaining public order, which belong under normal conditions to the civil authority. As a rule the state of siege may be declared only by law. The President of the Republic may declare it, after consulting the council of ministers, in case the Chambers are adjourned. Within two days the Chambers assemble of right, and either maintain or raise the state of siege.

When the Chamber of Deputies is dissolved, the President may not declare a state of siege even provisionally, until after the elections have been completed. The single exception to this rule is that in case of a foreign war, the President, upon the advice of the Cabinet, may declare a state of siege in the territories menaced by the enemy, provided that the Electoral Colleges are convoked and the Chambers convened as rapidly as possible. As soon as convened, however, the Chambers decide upon maintaining or raising the state of siege, which is automatically raised if they fail to agree on the matter.

GREAT BRITAIN. The Crown of England, acting of course through the ministry, can take such action as is necessary to prevent domestic disturbances. Martial law in England is, according to Fitzjames Stephan, "the assumption by the officers of the Crown of absolute power exercised by military force for the suppression of an insurrection and the restoration of order and lawful authority." The mere proclamation of martial law by the Crown, however, does not supersede civil law, for the acts performed under martial law are always subject to the control of the courts. Although it is true that it is the prerogative of the Crown to declare war with a foreign country, and that the courts may not question such right, this is not true in respect to the proclamation of martial law, for here the courts can go behind the proclamation and investigate whether as a matter of fact there is a state of affairs such as the proclamation describes, and whether the acts done by the authorities in putting down such insurrection or rebellion are justified.⁸⁴ During the World War, since there was no such internal disturbance as would justify the establishment of martial law by

⁸⁴ See J. H. Morgan, *The Army and the Civil Power*.

the Crown, and yet some measures seemed necessary to maintain safety and security, a sort of statutory martial law was placed in operation, through the Defense of the Realm Acts and the various regulations made thereunder.

Powers of the Chief of State in Respect to Amnesties and Pardons

THE UNITED STATES. The President of the United States, as chief executive, has the power to grant reprieves and pardons. In exercising this power he is bound by two express constitutional limitations: he cannot pardon a person who has been convicted by impeachment proceedings, and in this way restore such person to office, nor can he grant pardons except for offenses against the laws of the United States. He has no right to pardon a person convicted of violating the laws of a State. The pardoning power may be exercised before, during, or after trial;³⁵ it extends to criminal contempt in a federal court;³⁶ but it must be accepted to be effective.³⁷ Similarly, the President may commute any sentence imposed by a federal court, but the consent of the person under sentence is not necessary to make the commutation effective.³⁸ When the power of pardon is exercised in behalf of classes of persons, rather than individuals specifically named, this act is called amnesty. Both the President and Congress may grant amnesties. In exercising the pardoning power, the President depends largely upon the Department of Justice for information and legal opinions. He alone, however, makes the decision.

FRANCE. The pardoning power of the President of France is established by the constitutional law which provides: "The President of the Republic has the right of pardon."³⁹ This right is always exercised through a minister, by countersignature; and it is considered so much a function of the minister that the political responsibility of the latter may be engaged as

³⁵ *United States v. Wilson*, 32 U. S. (7 Pet.) 150, 8 L. Ed. 640 (1833).

³⁶ *Ex parte Grossman*, 267 U. S. 87, 45 S. Ct. 232, 69 L. Ed. 527 (1925).

³⁷ *Burdick v. United States*, 236 U. S. 79, 35 S. Ct. 267, 59 L. Ed. 476 (1915).

³⁸ *Biddle v. Perovich*, 274 U. S. 480, 47 S. Ct. 664, 71 L. Ed. 1161 (1927).

³⁹ Law of February 25, 1875, Art. 3.

the result of a pardon. Thus in 1911 the question was raised in the Chamber of Deputies, and both the president of the Chamber and the president of the Council of Ministers (at that time M. Briand) recognized the right of the members to bring interpellation as to the exercise of the pardoning power under the countersignature of the Minister of Justice. Amnesties are not within the powers of the President, but may be granted only by law.⁴⁰

GREAT BRITAIN. The powers of pardon and reprieve in England belong to the Crown. In practice they are exercised by the Home Secretary. "The power of the King to pardon, which arose from the fact that criminal prosecutions are taken in his name, applies only to crimes and has no effect on civil procedure."⁴¹ Under certain conditions the royal prerogative is used to give a "free pardon," the equivalent of a declaration of innocence, to a person who has been convicted mistakenly of a crime which he did not commit.

Summary and Conclusions

There are few problems in government which give rise to more disagreement than those connected with the Chief of State. The countries considered above have found almost no common solutions to these problems, except that they agree in making the executive head of the government one man rather than a committee.

For selecting the Head of State, England, the United States, and France use three different systems; the system of the hereditary monarch, the system of indirect election by the people, and the system of election by the legislative bodies sitting in National Assembly. Which is the better method? There are arguments for and arguments against each system. It is argued that the hereditary method, used in Great Britain, gives a more dignified Head of State; that the King becomes symbolic of the state and therefore appeals emotionally to the subjects; that the system gives a greater continuity to the executive

⁴⁰ *Ibid.*, Sec. 2.

⁴¹ Sir Edward Troup, *The Home Office*, Whitehall Series (London, 1925), p. 57.

power and also creates a center for social life. Against this viewpoint it is maintained that in a modern democracy, Kings and Queens are anachronisms; that the institution is very expensive; that the system is not democratic, and that the country has no guarantee that the best man or even a fairly good man will occupy the position.

It was the feeling of the fathers of the Constitution of the United States, that popular selection of the chief executive would be dangerous. Democracies were far too turbulent to elect the President; consequently an indirect method of selection was devised. As has been shown above, through historical developments this method has become practically direct. Several arguments can be brought against the system as it now exists. In the first place, a minority of popular votes properly distributed may elect a President.⁴² In the second place, as the system works in practice, while lacking the advantages, it has all the disadvantages of direct election by the people: great cost, a disturbing effect upon business, the placing of undue attention during the election campaign upon the President rather than upon members of Congress; the inevitable development of political machines that are interested in getting votes rather than working for policies; the tendency of the presidential candidates to develop and control public policy; and the almost inevitable development of the spoils system, since the great army of persons necessary to conduct a presidential campaign must be taken care of by patronage. There is also the tendency to judge of State and local policies on national party lines, instead of making these policies stand on their own merits. The extent to which these evils of direct election are present depends upon various factors. Undoubtedly if the entire national service, and particularly the higher service, is on a civil service basis, and the President has no great patronage, some of these disadvantages are obviated.

There are many things to be said in favor of the French system, particularly in a parliamentary government, since it obviates most of the difficulties resulting from direct election.

⁴² Samuel J. Tilden in 1876 and Grover Cleveland in 1888 received substantial popular pluralities but lost the electoral vote.

Whether it would work well when the President wields such enormous powers as does the President of the United States, is more than doubtful. Under such conditions the system would almost certainly tend to subordinate the legislature to the President; there might be deadlocks in the choice of the President; and the election of Senators and Representatives might turn upon their pledged vote for President.

There is rather general agreement in European democracies, particularly the ones considered here, that the Chief of State should not play any important rôle in government. This is in striking contrast to the theory and practice in the United States, where the President dominates, if he be a strong man, the whole governmental system, legislative, executive, administrative (and even by his power of appointment the judicial system, though to a much less degree). While there may be some advantages in such a situation, as leadership, centralization of control, and coordination of policy with administration, there are many disadvantages. Perhaps the greatest is the fact that men are not created with the necessary faculties to assume such vast power, either mentally, morally or physically. Nor is there time during the day to give more than superficial thought to all the pressing problems that arise, even if the chief executive had a remarkable mind and an iron constitution. This means that he must trust to advisers, that he must delegate his work as far as possible to subordinates, that he must make many "snap judgments" without adequate consideration. Very serious consequences may follow from the fact that the President is too busy, too tired, or too occupied with minor details to look upon the larger problems of government. One should not be deceived into believing that the mere elevation of a man to an important position makes him equal to that position. Many of the difficulties just mentioned are avoided in part by giving the Chief of State a position of great power in theory, but little power in reality.

In all the countries under consideration, the Head of State has certain functions in respect to the sessions of the legislature. The President of the United States has rather less power in this respect than other Heads of State, for the time of the meet-

ing of Congress is fixed by the Constitution, and he cannot dissolve Congress, although he may adjourn it. There are certain advantages in the system whereby the Chief of State may dissolve the legislative chambers, as in France and England. By this system it is possible to resolve deadlocks and also to learn whether the policies advocated by the legislature are still in harmony with the will of the people. The power is particularly valuable in a parliamentary government when there is violent disagreement on fundamental questions of public policy, for it gives the people a chance to express themselves.

None of the Chiefs of State in the countries under consideration has very large powers in respect to legislation. It is true that in both France and the United States the President may send messages to the legislature, but in neither country does the legislature have to act upon them. In none of the three countries, except the United States, does the President have the veto power. Should the Chief of State have such power? The arguments in the affirmative are that the veto power will act as a check upon ill-considered and hasty legislation; and that it will be able to prevent legislation that arises merely from the passion of the moment, or from the turbulence of the people, which is reflected in the representative body. There are several serious objections to the use of such power by the Chief of State. One of the most important from a theoretical point of view is the fact that it is contrary to the principles of representative government. Of course, the answer may be given that the representatives of the people may well prevail in case two-thirds of them are opposed to the veto of the President. The difficulty of securing a two-thirds vote in favor of a measure is, however, so great as to be almost impossible except under the very circumstances which the veto is supposed to provide against, that is, a great uprising of popular feeling. In practice, Congress considers each measure very much more thoroughly than the President can. On any important measure there are as a rule weeks or even months of committee hearings, in which most of the arguments pro and con in respect to the measure are brought out. There are debates in both houses. The President may possibly have as much information

on any measure as Congress has, but this is not probable. He may have advisers, but they may all be from the same class or represent almost the same interests, whereas this is rarely true of Congress. Much of the value of the study and debate given to a measure by Congress is lost when the veto power makes Congress to a large extent irresponsible. Quite often, in order to please his constituents, a Representative or Senator may vote for a measure which he believes to be unsound, knowing that the President will veto it.

In none of the countries considered, except the United States, is the Chief of State the head of the administrative system of the country. In the other countries the Cabinet acts as the general directing head, and each different department is under the immediate control and supervision of a minister. The United States gives its Chief of State more real administrative powers than any other country. Although in England and France the Chief of State theoretically has large administrative powers, these are in nearly all cases exercised by the ministry. Moreover, in the conduct of administration, the ministry is responsible to the legislature. This is one of the fundamental differences between a parliamentary form of government and a presidential form. In the parliamentary form of government, the theory is that the administration should be subordinate to the legislature, and that the legislature, while presumably endorsing the policies of an administration which holds its confidence, is nevertheless in the end the controlling factor.

The theory of the presidential system is that the executive and administrative branch of the government should be coequal with the legislative branch; that administration should not be controlled by the legislature, except through the power of organizing it, of making appropriations, and of passing laws regarding its functioning. There is no control exercised by Congress to check up the administration in its day-by-day functioning. This is the duty of the executive. It is true that in case Congress suspects corruption, or serious faults in the functioning of any branch of administration, it may make investigations. This, however, is not a daily control, but a very unusual control.

In no respect is there greater difference between the countries under consideration than in respect to the ordinance power, or the power of the chief executive to issue what may be called for want of a better name sub-legislative enactments. Theoretically the President of the United States is in a very unfavorable position in respect to the exercise of such power, since theoretically the doctrine of separation of powers prevents him from issuing any orders or acts legislative in nature, except in fields where he has been given constitutional authority. It is certain that the legislature cannot constitutionally delegate to him any legislative powers. It is equally certain that Congress, as a matter of fact, has delegated to the President powers that are to all intents legislative; sometimes directly, and sometimes indirectly by bestowing such powers upon the heads of the departments. The courts, realizing the necessity of such arrangements, have euphoniously called such powers quasi-legislative and have upheld their delegation. Experience has demonstrated that one of the greatest difficulties in respect to the doctrine of the separation of powers has developed in regard to sub-legislative enactments. Because of this difficulty alone it is necessary to reexamine the whole doctrine of separation of powers.

The powers of the Chief of State in respect to foreign relations are controlled by the Cabinet, except in the United States. Here, and here alone, has one man, uncontrolled, the power to bring about an actual state of war, although no responsible Cabinet, no Congress declaring war, may sanction his acts. In all countries, perhaps, the negotiation of treaties is an unsatisfactory matter, uncertain and involved.

There can be little doubt that present-day developments in government and administration make necessary a reconsideration in all countries of some of the fundamental relationships between the Chief of State and the legislature. This is particularly true in respect to the relationship that should obtain in the formulation of policy, the relationship in respect to sub-legislation, and the relationship in respect to treaties and foreign policies. It is evident that there can be improvements in nearly all countries in respect to such matters.

CHAPTER XI

THE CABINET

In many countries at present the Cabinet is becoming a more and more important factor in government. This development is due in part to the fact that most legislatures are now so large as to be unwieldy, so that on the ground of size alone they are actually less able than formerly to transact business in a reasonably expeditious and effective manner. Moreover, the very great volume of governmental business that must be handled, and its increasing complexity, require expertly informed management. In other words, the same reasons which have made the legislature inefficient and unable to cope with the work before it, have made for the increase of the powers of the Cabinet.

Organization of the Cabinet

THE UNITED STATES. The Constitution of the United States makes no mention of a Cabinet. It merely implies the existence of heads of departments, in the provision that the President "may require the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices."¹ No law organizes the Cabinet as a special agency, although each individual executive department is separately established and organized by statute. The departmental heads meet with the President for conferences on public affairs purely as a matter of custom. These meetings are popularly called Cabinet meetings, and the heads of departments, considered as a group, are known as the Cabinet. Individually the members of the Cabinet are "Secretaries" of departments, with the exception of the Attorney General and the Postmaster General, not "Ministers" as in most foreign countries.

¹ Art. II, Sec. 2.

GREAT BRITAIN. The British Cabinet, despite its very great importance, is likewise an extra-legal institution. In common parlance, the words *Cabinet* and *ministry* are used almost interchangeably. In both composition and functions, however, the two groups are quite distinct from each other. The ministry is composed of the whole number of the Crown officials who have seats in Parliament, are responsible to that body, and hold office subject to the approval of a working majority of the House of Commons.² According to Muir, the ministry "consists of all those members of both Houses of Parliament who are appointed to various offices, great or small, by each new Prime Minister when he has been entrusted with the duty of 'forming a Ministry' after a victory at the polls, or the defeat of a previous Ministry in the House of Commons."³ The ministry includes about sixty or sixty-five salaried officers, who assume the task of government together, and who go out of office together. The great majority of persons included in the ministry are drawn from the House of Commons; the others, from the House of Lords. Thus, the Conservative Ministry of 1924-1929 contained forty-eight members of the House of Commons, and only eighteen members of the House of Lords, half of these being connected with the Court.⁴ The total number included several court officials, several under-secretaries, and other subordinate ministerial officers.

The Cabinet is a small group of the most important persons in the ministry. It always includes certain important ministers who are the political heads of the great governmental departments; also a few other persons invested with traditional honorific offices, such as the Lord President of the Council, the Lord Privy Seal, and the Chancellor of the Duchy of Lancaster, who have no specific duties to perform in connection with administration. The politically important officers who can never be left out include the First Lord of the Treasury, the Chancellor of the Exchequer, the First Lord of the Admiralty, and the chief secretaries of state, who head respectively the

² See F. A. Ogg, *English Government and Politics* (New York, 1930), p. 123.

³ Ramsay Muir, *How Britain is Governed* (New York, 1932), p. 81.

⁴ *Ibid.*, p. 82.

Foreign Office, the Home Office, the War Office, the Office for the Dominions and Colonies, the Indian Office, the Air Ministry, and the Scottish Office. The holders of other offices may be invited to join the Cabinet, at the discretion of the Prime Minister.

FRANCE. The Cabinet in France is called the Council of Ministers. The Constitution makes only a few vague references to the Cabinet, although it does contain a number of provisions regarding the ministers and some of their attributes. Special laws at times have established various features of the particular powers of one or another minister. ✓

By laws of April 1, 1920⁵ and of June 20, 1920⁶ it was provided that the creation of ministries or of sub-secretariats of state, and the transfer of powers from one ministerial department to another, may be ordered only by law, and made operative only after such a law has actually been passed. These provisions were adopted because of a widespread belief that abuses had grown up during the World War in connection with the use of decrees to establish or alter departments; that already there was an excessively large and complex administrative structure, manned to a considerable extent by persons who were not needed for the good of the service, but who sought to retain their offices; and that considerations of public economy made it necessary to check any further development in the same direction. However, the effort to check it by the laws just cited has not been successful. As one ministry has succeeded another, the number of ministers has varied (usually from thirteen to fifteen), and that of under-secretaries of state has varied even more. In many cases changes have been made in utter disregard of the law. In other cases changes have been first, and later reported to Parliament for ratification. Occasionally one or the other of the Chambers has objected to this illegal method of procedure. For the most part, however, the changes are made first and ratified later, or perhaps tacitly ratified by a grant of credits, without any serious opposition.

⁵ Art. 35.

⁶ Art. 8.

This contrast between law and practice arises from the exigencies of the political situation caused by the large number of parties in France, the instability of the coalitions and agreements among them which are necessary to the formation and support of any cabinet, and the changes which occur from time to time in the parliamentary representation of the various parties. Any man who undertakes the task of forming a Cabinet is confronted with the necessity of securing the support of a sufficient number of partisan groups to control a majority of votes in the Chambers. This support can be secured only by giving each group such representation in the Cabinet as will satisfy its demands. It is obvious that this delicate balance and adjustment must necessitate occasional changes. Thus, if party A is to have the Ministry of Justice and the Ministry of Finance, party B may express itself as unwilling to accept the portfolios which are offered to it unless it is also given an under-secretariat of state in the Ministry of Finance; and party C may demand for its most important representative a powerful department which can be created only by combining two existing ministries. When the political situation is particularly complex, it is hardly possible to form a Cabinet without making certain changes to meet the demands of the parties. On the other hand, if the coalition parties are satisfied, they may be depended upon to ratify the changes and to grant the requisite credits, when the matter arises in the Chambers.

Methods of Selection

THE UNITED STATES. In the United States the members of the Cabinet are chosen by the President, by and with the advice and consent of the Senate. It is very seldom, however, that the Senate interferes with the selection of the Cabinet, (since it is understood that the various heads of departments are to be the intimate personal advisers of the President. Except in case of impeachment, the President has the exclusive power of removing Cabinet members from office.)

GREAT BRITAIN. In England, the first step in the formation of a Cabinet is the selection of a Prime Minister by the

King. As soon as a Premier hands in his resignation, the Sovereign sends for the statesman whom he considers best able to form a new ministry, and formally commissions him to prepare a list of ministers. The choice of the King is greatly limited, since it must fall upon a man who can command the support of a parliamentary majority. When one party has a clear majority of seats, its accepted leader must be asked to form a Cabinet. When no party has a majority, or when the majority party has more than one outstanding personality, the King's choice is less perfunctory. The outgoing Premier expresses his candid opinion as to the selection of his successor. Circumstances decide whether even a Victoria must submit to the loss of a favorite Premier and the entering into office of a man disliked and distrusted by the very Sovereign who tenders him the position; or whether, as in 1923 and 1929, when no party had a majority in the House of Commons, the personal judgment and will of the King may have considerable weight. In the final analysis, it is the voters who decide indirectly upon the Premier, since the support of a working majority in the House of Commons is indispensable.

In theory, the Premier, once commissioned, has a free hand in selecting the various ministers, for he is neither controlled by Parliament in his choices, nor restrained by any fear that the King may refuse the list which he presents at Buckingham Palace. In practice, however, the selection of a Cabinet is far from a simple matter. The Premier must not forget precedents, customs and usages; but above all, he is constrained by the actual political situation. He must consult with other important personages in the party, and sometimes even outside it; often he must be guided more or less by business and economic circumstances, or the feeling of labor leaders or business leaders toward certain individuals. His associates must have enough prestige and power to control the House of Commons. Several factors, nevertheless, make for greater ease in forming a Cabinet in England than in France, for example. It is often possible to avoid a coalition ministry. This means that there will not have to be so many compromises along party lines as are needed in France. Again, since it

is usually known well in advance that a ministry is about to retire, time is given for the party chief of the opposition to consider whom he will choose as members of his contemplated Cabinet. In England, therefore, the formation of a ministry requires normally but a few hours, instead of days or sometimes weeks as in France and formerly in Germany.

All ministers must have seats in one or the other House of Parliament. This does not mean that every one appointed to a ministerial post must have a seat at the time of such appointment. It sometimes happens that a person who is obviously the best man for a given portfolio is not at the time a member of Parliament. In such case he will be appointed to the position, with the understanding that he will seek election as soon as a seat is vacant. This may be managed by the resignation of a loyal party member from a safe constituency which is sure to return the Cabinet member. If all else fails, the important personage may be made a peer, with the right to a seat in the House of Lords. Such incidents are not out of the ordinary. With rare exceptions, however, the Prime Minister makes his appointments from among the leading members of his party, who are already in Parliament. Ministers do not vacate their seats upon receiving the ministerial office.

FRANCE. The President of the French Republic appoints the ministers by decree. Although there is no constitutional provision specifically giving him this power, it is generally agreed that he derives it from the clause authorizing him to appoint to all civil and military positions. Some persons hold that the right results from the requirement in the constitution itself of certain acts on the part of the ministers; others believe that the ministers, like the members of the Cabinet in the United States, are merely the agents of the President in carrying out the executive functions, so that their appointment is merely a normal use of executive authority. The point is of no real importance, since the President actually does nothing but ratify selections made by the Premier, who, as in England, must be a man who can lead Parliament. ✓

The President and also the Premier of France are both

limited in their choice of men, by a complex party situation which nearly always means a coalition government, with all its compromises and "deals." It is customary to select Cabinet members from among the members of Parliament, except for certain technical departments such as those of the army and the navy, which portfolios may be held by persons not in Parliament. By and large, parliamentary membership for the ministers is more than advisable in any country under parliamentary government; since the Cabinet can best direct and control the legislature, as well as accept responsibility toward it, when the ministers are an organic part thereof.

The Prime Minister

THE UNITED STATES. Every member of the Cabinet is theoretically on an equal footing. There is no Prime Minister who selects the other members of the Cabinet, generally controls policy, and is responsible for the unified action of the Cabinet. Each Cabinet member is appointed separately and independently from among the President's personal friends, or from among "deserving" members of the party. Nevertheless, although no member of the Cabinet has any power over the others, the office of Secretary of State is considered to be highest in prestige and honor.

ENGLAND. In England, the characteristic circumstance exists that theory regarding the Prime Minister differs greatly from the actual situation. In theory he is only *primus inter pares*. Strictly speaking, there is no office of Prime Minister. The Prime Minister, as such, receives no salary, but is paid only for the secretariat which he holds. In fact, it was not until 1878 that the term Prime Minister came into use.⁷ "As a minister, the premier has statutory duties and a salary; as prime minister, he has neither, being merely accepted and recognized for what he is, after two centuries of hazardous historical development."⁸

⁷ S. J. M. Low, *The Governance of England* (New York and London, 1914), rev. ed., p. 150.

⁸ *Ibid.*

The Premiership is the highest reward that England offers to political ambition. Even a peerage, even the highest office in a great dominion, is not its equivalent, as the late Lord Curzon painfully realized. The Prime Minister is:

... the working head of the State, endued with such a plenitude of power as no other constitutional ruler in the world possesses, not even the President of the United States. For, so long as his party commands a majority in the House of Commons, he can do what no President can ever do—he can give a pledge beforehand that such-and-such a treaty will be signed and ratified, that such-and-such a law will be passed, or that such-and-such moneys will be voted by Parliament. He can do this because, so long as he controls a majority in the House of Commons, he wields all the powers of Parliament as well as all the powers of the Crown. But it is necessary that he should carry his colleagues in the Cabinet, or a large majority of them, along with him; because, while they are his nominees, they are also the leading members of his party, and all his powers will disappear if he cannot count upon the support of his party. . . . At one moment a man has at his disposal peerages, honours, vice-royalties, all the greatest and most splendid offices in the State, to give or to withhold; he can make peace or war, can decide what laws shall be made, and take from the pockets of 45,000,000 people almost what money he thinks necessary: at the next he can do nothing but carp at the proceedings of his successor.⁹

At the meetings of the Cabinet the Prime Minister is chairman. Although, as one minister among others, he is theoretically the leader among his equals, he is usually much more than this. The Prime Minister possesses far more power than is derived from his portfolio, because he is normally the strongest man in his party, and always a man of long political experience, and because the other members are dependent upon him for their positions and must resign in case of an insoluble conflict of opinion. As Lowell says, "... matters of great importance ought to be brought to his attention before they are discussed in the cabinet; and any differences that may arise between

⁹ Muir, *op. cit.*, pp. 83-84.

ministers or departments should be submitted to him for decision, subject to a possible appeal to the cabinet."¹⁰ In a word, the Prime Minister is definitely the leading man in the government.

FRANCE. The President of the Council of Ministers in France holds a position which is not definitely established by the Constitution, or in fact, by any other law. Custom and political necessity alone have created such an office. It is an accepted principle of political organization that where a Cabinet is responsible to Parliament as a unified body, for general lines of policy, it must be chosen by, and be more or less under the control of, a political leader who can both secure the support of a majority of the legislature and align the Cabinet so that it presents a united front.

The official title, President of the Council of Ministers, is bestowed by presidential decree, with the incoming of each new Premier. The President of the Council of Ministers usually holds one of the more important portfolios, such as the ministry of foreign affairs or of the interior. He has also certain specialized duties to perform, including the convocation of the meetings of the Council of Ministers and the Cabinet Council,¹¹ the preparation of notes for the press in respect to action taken at such meetings if he deems this desirable, the preparation of declarations or statements which the government wishes to make to the legislative Chambers, and the presentation of such statements in person to at least one of the Chambers. Although the President of the Council of Ministers has far greater responsibilities than his colleagues, he receives no higher salary, nor are any ceremonial honors bestowed upon him.

✓ < The President of the Council of Ministers is expected to direct the general policy of the government. He does not have much control over other ministries than his own, particularly

¹⁰ A. L. Lowell, *Greater European Governments* (Cambridge, Massachusetts, 1918), p. 23.

¹¹ The Council of Ministers is a formal meeting with the President of the Republic in the chair; the Cabinet Council is a less formal meeting with the President of the Council of Ministers in the chair. All major decisions are made in meetings of the Council of Ministers, and many laws require certain important decrees to be ratified at such meetings.

since correspondence between the other ministers and the legislature, and correspondence among the ministers themselves, do not pass through his hands. Further, although bills for laws which are introduced into the Chambers are previously discussed in the Council of Ministers, the President of the Council signs only those which concern his own department.¹²

The Relationship of the Cabinet to the Head of State

THE UNITED STATES. In the United States the Cabinet as an organization is merely an advisory body to the Chief of State. The President is not bound in any way to take its advice. At times, naturally, such advice may be quite important in the shaping of policy, particularly if certain members of the Cabinet are strong personalities.

ENGLAND. In England the situation is almost directly opposite to that which exists in the United States. Since the Cabinet is responsible for policy to Parliament, it is only logical that it should have the right to insist upon any policy which it regards as necessary. As a result, the King must submit to the policy of the Cabinet. It may be possible, of course, for the King to persuade the Cabinet to abandon a policy of which he does not approve, but in case he is unable to persuade them, and they insist upon their views, he must yield.

FRANCE. In France the Cabinet and the President stand in a rather complex relationship as to powers and controls. Although the Premier of France is selected always by the President of the Republic, he is not responsible to the President, but to Parliament. The other members of the Cabinet, who are selected, in turn, by the Premier and are then appointed by the President, are likewise not responsible to the President, but to Parliament. The vast powers lodged in the President are all exercised under the control of the ministers, who assume responsibility through the countersignature, and answer to Parliament for the acts of the President. The organization of departments and administrative services, the appointment of

¹² E. L. P. Fuzier-Herman, *Répertoire général alphabétique du droit français* (Paris, 1895), Vol. XIII, p. 512, Pars. 23 and 25.

officers, the issuing of regulations of public administration, and many other acts which are nominally presidential, are in reality acts of the Cabinet or members of the Cabinet, who prepare them in complete form and submit them to the President for his signature. Although in theory the ministers stand between the executive and supervisory authority, the President, and the general administrative organization for the carrying on of state functions both central and local, in practice it is the ministers rather than the President who organize, execute, and control the operation of administrative functions.

Functions of the Cabinet

It is important to differentiate the functions which the Cabinet undertakes as a body from those carried on separately by the various members.

THE UNITED STATES. In the United States, the members of the Cabinet are merely heads of departments with whom the President consults. The Cabinet does not resemble Cabinets in parliamentary countries, except in the most superficial way. It is not a true organ of government. Not even the individual members of the Cabinet possess the combination of political and administrative functions, and stand in the relationship of responsibility to the legislature, characteristic of the ministers in the other countries which we are examining; but at least their positions and their chief duties and functions are established by law. The Cabinet as a body, on the contrary, is not even recognized by law. It is merely created by custom, and its duties, such as they are, result from custom and from the orders of the President. The word *Cabinet* in the United States is merely a convenient expression for the heads of the various departments of the national administration, particularly when they meet as a group to advise the President.

Congress has established the executive departments and has regulated in considerable detail their internal arrangements. Thus, it has provided for the bureaus into which the departments are to be divided, and determined the powers and duties of not only the heads of the departments but also the heads of

the bureaus. Although in some cases Congress, in entrusting to the head of a department the performance of certain duties, has left to him the task of organizing the departmental machinery for the performance of such duties, a law (usually an appropriation act) nearly always ratifies the organization which has been accomplished.

The Cabinet in the United States is not vested with ordinance power. Although individual heads of departments may be given certain ordinance powers or sub-legislative powers, the Cabinet as a whole has none. [Neither the Cabinet nor individual members of the Cabinet can be held responsible in any way for the acts of the President. On the other hand, the President is responsible for the acts of Cabinet members,] although this responsibility can be enforced only by impeachment. It is true that Congress can abolish by law bureaus or even departments which do not please it, but this is not truly holding the President responsible.

[The Cabinet in the United States is not expected to take the lead in the formulation of legislative policy. As a matter of practice, the heads of departments are constantly in touch with the legislature in one way or another, and do assist to a very great extent in the preparation of bills.] In this respect, however, the heads of departments are not in a very different position from private organizations which wish to secure the passage of certain laws. [They may present their plans and their arguments to members of Congress, but there is no official route by which the heads of departments may normally participate in planning and preparing bills. As for the Cabinet as a whole, it is hardly conceivable that this group might organize a certain policy and try to secure its adoption by the legislature. The members of the Cabinet are concerned chiefly with laws affecting their own departments.]

[Although the Cabinet as a whole may scarcely be said to have any functions, the reverse is true of the individual members, who must possess particular and special functions. There are no members of the Cabinet in the United States, such as are often found in European countries, without portfolios. Every member is the head of an administrative department.]

ENGLAND. The functions of the Cabinet in England have been summarized by Ramsay Muir in two striking sentences.

If Separation of Powers is the essential principle of the American Constitution, Concentration of Responsibility is the essential principle of the British Constitution. . . . In short, the essence of the British system is that all power and all responsibility tend more and more to be concentrated upon what we call "the Government"; and that, so long as "the Government" commands a docile majority in Parliament, its power is practically unlimited and uncontrolled, except by the fear of alienating public opinion and therefore losing its power at the next general election.¹³

The government carries on in the King's name all the vast complex powers known as the "Royal Prerogative." The functions that result from this prerogative are not all clearly given and defined by any verbal enactment, but consist of every power that has not been specifically withdrawn from the King or definitely limited by law. Since there is no limit to the King's power save that he cannot make or alter laws or raise taxes without the assent of Parliament, and that he must remain within the law when a definite law has been made, there is likewise no limit to the power of the ministry acting in his name, other than those limits affecting the King.¹⁴

Dicey considers the prerogative to be what remains of the ancient or common law powers inherent in the Crown. It is requisite to understand that it actually consists of important powers which are not exercised under strict legal provisions, and which are capable of being expanded very considerably at any time when this may seem necessary. These powers are employed by the Cabinet in office, "subject only to the safeguard (which is, as far as it goes, a real one) that the King can protest privately against anything being done in his name which he strongly disapproves."¹⁵

¹³ Muir, *op. cit.*, pp. 21, 23.

¹⁴ On the royal prerogative see A. L. Lowell, *The Government of England* (New York, 1919), Vol. I, p. 18; Muir, *op. cit.*, pp. 24-25; J. J. Clarke, *Outlines of Central Government* (London, 1923), 2d ed., p. 10; A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, 1915), 8th ed., pp. 459ff.

¹⁵ Muir, *op. cit.*, p. 24.

Further than this, whenever the government commands a clear majority in the House of Commons, for all practical purposes it wields the whole power of Parliament as well, through control over the party organization. Although theoretically the ordinary member of Parliament has the right to initiate legislation, in practice this right is of little value. On only one day in the week may a private member introduce a bill and have it discussed. Toward the end of the session, the government will take up even this time. The result is that the Cabinet alone is normally responsible for drafting and introducing all important legislation. Although bills may be modified during the discussion in either House of Parliament, if the government has a stable majority this will be done only with its consent.

The administrative work of the ministry in England is far wider than that belonging to the heads of the departments in the United States. In addition to directing and controlling the work of national administration in Great Britain, the ministry directs and controls much of the administrative work in vast territories such as India, and other colonies not yet self-governing. It also controls local government to a very large extent, through its supervision over education, the maintenance of city and rural police forces, the work of public health and sanitation, housing schemes, and so on.

It is a commonplace of British constitutional law that the House of Commons is the ultimate and final controller of public policy because it "holds the purse strings." In theory this is true, but in practice the government exercises the same dominating control over finance as over ordinary legislation. The budget bill has become such a vast and bulky volume, containing so many provisions for such a great variety of services, that it is impossible for Parliament to examine it and discuss it in any detail. Even were there a serious discussion of the estimates, which there is not, the ordinary members could not familiarize themselves with the exact needs of every department. There is little certainty that even the ministers themselves will have any detailed knowledge. Whenever any searching questions are asked, the ministers find it necessary to

consult the undersecretaries, who have great sheaves of written information at their disposal. In fact, as will be seen later, much of the work that is attributed to the Cabinet is actually carried out to a very large extent indeed within the governmental departments, the ministry being merely the political agency through which the active machinery of government is connected with the legislature.

Nearly all of the most important official positions in Great Britain and her colonies are filled through appointment by the government. All the ambassadors at foreign courts with their staffs, the Viceroy of India, the Governors-General of the Crown colonies and other dependencies, together with their chief officers, many professors in the universities, the higher officers in the army, navy and air forces, all the higher officers of the civil service, all judges, and even high clerics, such as bishops and deans, are thus appointed. Either the Prime Minister, or the minister whose department is particularly concerned, advises the King as to the choice of an incumbent for any vacancy.

This vast making of appointments and patronage is exercised without the advice and consent of Parliament. Occasionally a debate may take place upon a certain appointment if this seems an easy way of attacking the government, but such an occurrence is infrequent.

FRANCE. The functions of the Cabinet in France are partly set forth by law, and are partly the outgrowth of custom. As in other parliamentary governments, the Cabinet sometimes acts as a body, and sometimes merely as individual ministers carrying on functions within their own departments.

The Constitution and the laws require the Council of Ministers, acting as a body, to perform certain functions. When the office of the President of the Republic is vacant for any reason, the executive power descends upon the Council of Ministers as a body. Decrees appointing or dismissing councillors of state in ordinary service, and decrees organizing the Senate as a high court of justice for the trial of persons accused of attempts against the safety of the state, must, accord-

ing to the constitutional laws, be rendered in the Council of Ministers. The law ¹⁶ requires that decrees providing for the opening of supplementary or extraordinary budgets, in the absence of the Chambers, shall be discussed and approved in the Council of Ministers.¹⁷ Decrees establishing or increasing customs dues must be rendered in the Council of Ministers.¹⁸ These are examples of a number of similar requirements, which are intended to assure consideration of certain important subjects by the Cabinet as a whole. When the laws or the Constitution demand that decrees on certain subjects shall be made in the Council of Ministers, if this has not been done, the decrees may not be legally signed by the President of the Republic. Even if they are signed by him, the Council of State will declare such decrees void.

Although nominally, as we have seen, the regulatory power belongs to the President, in practice it is exercised by the Cabinet. There is probably no country where the regulatory power of the government, that is, the Cabinet, extends further and deeper than in France.

The Cabinet has far less control over finances in France than in England. There are several reasons for this. The French Cabinet is practically always a coalition Cabinet, instead of a Cabinet formed by a majority party. It cannot, therefore, lead Parliament with the same authority as the normal English Cabinet which has the support of a strong and dominating party. Again, the Cabinet in France has no power, as has the English Cabinet, to dissolve Parliament. Thus, when the finance committees of the Chambers act upon a budget project prepared by themselves, rather than upon the financial plans made by the Minister of Finance, or when the Chambers make important changes in items of the budget project prepared by the Cabinet, the government of the day has no weapon with which to resist the onslaughts made on its plans. Mere habit, no doubt, adds to the improbability that a Cabinet will offer determined resistance to any change in its estimates.

¹⁶ Law of December 14, 1879.

¹⁷ Law of March 29, 1910, Art. 3.

¹⁸ *Ibid.*

Control over the Cabinet

THE UNITED STATES. Since neither the Cabinet nor its individual members can be held directly responsible to Congress, the legislature has no direct control over the Cabinet. It is true that the Senate must ratify the appointment of the various members, but this control is a very slight one, which does not have any particular effect upon their policies or their acts. It merely may prevent certain persons with particular policies or beliefs from becoming members of the Cabinet.

The effective direct control over Cabinet members in the United States belongs to the President. He may, and frequently does, request the resignation of any member; and, conversely, he may retain in office a member whose conduct of his department has been severely censured by Congress. Congressional investigations, by bringing to light evidence of abuses, fraud, or scandalous incompetence, occasionally compel the President, lest he appear to condone these evils, to dismiss a Cabinet member; or they may even furnish a basis for legal prosecution. Impeachment is an extreme means of control which is seldom used.

The laws, of course, control the Cabinet members. In certain kinds of cases the courts will act to compel them to observe the laws. This control is neither immediate nor constant, and the courts have a tendency to refuse jurisdiction, or to decide in favor of the Cabinet member who is accused of violating the law, if there has been any opportunity for the use of his discretionary powers.

FRANCE. In France the ministers are controlled in three different ways, politically, civilly and penally.

Politically the ministers are responsible for all their official acts. The Constitutional Law of 1875 provides that the ministers shall be collectively responsible to the Chambers for the general policy of the government, individually responsible for their own functions, and responsible for acts of the national President which are countersigned by them.

Collectively, their political responsibility means that they must go out of power when they are unable to carry out the

functions of leadership and control in the legislature. When the Cabinet is not able to make its will prevail on a vital matter it must resign. A vote of lack of confidence normally will also be followed by the resignation of the Cabinet.

The responsibility of each individual minister consists in the moral obligation to resign if he alone, distinctly and separately from his colleagues, has lost the confidence of Parliament. This will seldom occur, as the Council of Ministers generally will support any member who is singled out for attack, and will make it clear to the legislature that the forced resignation of said member will bring about the resignation of the entire Cabinet. Unless the legislature is willing to precipitate a Cabinet crisis, therefore, in France as elsewhere, it will hesitate to attack a minister without the strongest of reasons.

The minister or ministers who may have countersigned presidential decrees or other acts must answer for them. In countersigning presidential acts, a minister virtually exercises the functions of the Presidency. Parliament can hold such a minister responsible in exactly the same way as if the act in question were wholly his own.

The civil responsibility of the ministers may result from grave faults committed in violation of the interests of private individuals or the interests of the state. According to the prevailing doctrine of French jurisprudence, individuals injured by a ministerial act may request damages. If the act is a purely personal fault, resulting from conduct entirely outside the minister's official sphere of power, the case is tried before the ordinary courts. If, however, the act is what the Council of State recognizes as a fault of service, or an act which the minister performs within his functions and for the good of the service, but performs in a mistaken, wrong, or faulty manner, the state is held to be responsible for the act of the minister, and the case is tried before the administrative court, the Council of State.¹⁹

¹⁹ See J. Bailby, *De la responsabilité de l'Etat envers les particuliers* (Bordeaux, 1901); P. Tirard, *De la responsabilité de la puissance publique* (Paris, 1906); E. Giraud, *De la responsabilité de l'Etat à raison des dommages naissant de la loi* (Paris, 1917); F. F. Blachly and M. E. Oatman, *Responsibility of the State and Its Agents*.

The Council of State will decide whether a fault of service has been committed, and if it finds in the affirmative, it will allow compensation from the public treasury to the injured individual. If the state, rather than the individual, has been injured by a fault of service, reparation is seldom made. Although theoretically the ministers are financially responsible to the state, in practice, because of the large sums involved, the discretionary nature of most official financial transactions, and perhaps political considerations, it is almost impossible to collect damages for the state when there has been no fraud or speculation. Thus, when a Minister of Public Works calculated that two and a half million francs would be sufficient for the building of the office of the Court of Accounts, and ultimately eleven millions were spent, he was not tried and made to pay the difference between his estimate and the actual cost, although his mistake had been costly to the state.

The penal responsibility of the ministers has to do with infractions of law committed by them in the exercise of their ministerial functions, where a penalty is provided by law. For such acts ministers are placed in accusation by the Chamber of Deputies and are tried by the Senate.²⁰

Summary and Conclusions

Although in all the countries which have been considered, the Cabinet (or the group of administrators and political advisers or directors of policy called by that name) performs very important functions, in England and the United States the law does not organize the Cabinet at all, and in France it does so very imperfectly. Circumstances have led to changes which the writers of the Constitution could not anticipate. Although the instances are too few to warrant confident generalizations, we may at least consider the possibility that a loose organization of the Cabinet based largely on custom and controlled by law only in its general outlines, may be preferable, because of its greater flexibility, to a more rigid organization prescribed in some detail by law.

²⁰ See F. Moreau, *Précis élémentaire de droit constitutionnel* (Paris, 1928), 10th ed., pp. 350, 351.

Of the three countries which are described, it is clear that the United States gives to its President more power and more freedom in the selection of his Cabinet, than are possessed by any other Head of State. Since the Cabinet members are responsible to the President alone, he also has far greater control over them than does the Head of State in any other country. Even the legislature, except by way of impeachment, is unable to remove them. It is undeniable that in the United States, as well as in parliamentary countries, some little attention must be paid when Cabinet members are chosen, to the demands of those in political power, business interests, financial interests, and other interests; but in the United States alone no attention need be given to the wishes of the legislature; and a change in the political control of Congress, midway in a President's term of office, does not in the least oblige him to make any alterations in the Cabinet. This is a most undesirable situation. It is less so, naturally, than if the Cabinet members were expected to guide and direct the work of the legislature; but there seems to be no excuse for permitting the various government departments to be directed, under circumstances that may actually arise quite often, by persons diametrically opposed to the policies of the legislature and the expressed will of the electorate.

In France, and of late in England also, another kind of difficulty has been found in connection with the choice of Cabinet members, that is, the selection of coalition Cabinets. It is hardly to be expected that a coalition Cabinet would be closely united in policy, even were its members chosen freely by the Prime Minister. Even less unity can be anticipated when the Cabinet is made up of men put forward for partisan reasons by the parties entering the coalition. Moreover, if the different members of a coalition Cabinet do come to an agreement, it is altogether possible that their respective parties will not support their program before the legislature, and that the Cabinet will fall because it cannot command a majority.

One of the important questions in political science is the relationship of the Cabinet, the Chief of State, and the legislature. In most countries, although in theory the Chief of State has large powers, these are exercised by the ministers; and the

Cabinet is actually responsible to the legislature for them. By this device the acts of the Chief of State come under the control of the legislature indirectly, as the acts of the Cabinet do directly. This is a striking contrast to the system in the United States, where very few acts of the President, except certain appointments and treaties, are brought under legislative control in any way.

What are the advantages of having a Cabinet which is responsible to the legislature wield the powers nominally given to the Chief of State? In the first place, all executive and administrative acts are at once placed under the control of the legislature, which can criticise them effectively at appropriate times. The control exercised over the President of the United States, and his Cabinet, by elections once in four years, does not reach individual acts, and has many other disadvantages, such as forgetfulness by the electorate of a major fault in the past, or undue resentment of a minor blunder in the present.

In the second place, since the individual ministers as a matter of fact prepare acts that affect their departments and present these to the Chief of State for signature, the labor and the responsibility are properly divided. The more important matters are handled either by the Cabinet as a whole or by the several ministers chiefly affected by them. The burden of executive action, which in the United States is becoming too heavy for any mortal man to bear, is thus placed upon several shoulders.

Finally, by this system the Chief of State is left free to attend to the necessary social, ceremonial, and diplomatic functions of government, all of which suffer when the Chief of State is required to be the political leader of his party, the active head of the entire administrative services of the government, as well as the ceremonial representative of the nation.

In the United States the Cabinet is not, as in England, France and Germany, the chief planning authority in the government and the director of public policy. Although as individuals the members of the Cabinet may make plans in respect to their departments, they are in no way charged with such planning. Congress may or may not adopt their suggestions.

They cannot compel Congress to consider their plans, since they possess no right of initiating bills. If some friendly legislator introduces bills at their request, they cannot appear on the floor of either House of Congress to defend them. All that they can do is to advocate their policies before committees, or explain them to individual members of Congress.

The picture is quite different in countries where the Cabinet is an integral part of the legislative machinery, and the official planning authority of the legislature. It assumes responsibility for planning policies and drafting bills. Sometimes the legislature requests it to make plans on a certain subject. Perhaps this is the strongest feature of the true Cabinet system. Its advantages are obvious, as regards both administrative details and large matters of policy. The members of the Cabinet, rather than the members of the legislature, are in a position to know the needs of the governmental services. They have at their immediate disposal both the information necessary for planning, and expert staffs to help them in the formulation of plans. Even in respect to great changes or radical innovations of general policy, the idea of Cabinet leadership seems sound, provided that the Cabinet can be replaced by another, if at any time the legislature feels that the policies advocated by the Cabinet are not adequate to the given situation. Responsible, concentrated leadership has many advantages over the haphazard formulation of public policy by any members of the legislature who have enough power and influence, however derived, to secure the passage of bills.

That governmental planning today is beyond the technical powers of the legislature as such, can hardly be denied. The problems involved are too new, too complex, and too technical for the legislature to handle without expert advice. It is more than probable that not even the Cabinet is capable of handling such problems successfully without a great deal of assistance. Part of this help may be supplied by the technical staffs, within particular departments. Much of it, however, would seem to involve long-time undertakings for which elaborate studies must be made and vast researches undertaken, and which may require for their completion the exercise of various techniques.

Since the members of the Cabinet are generally too closely concerned with party politics, and with the rush of daily business, to give long-time policies adequate consideration, many countries are developing some sort of planning machinery to assist both the Cabinet and the legislature. France, Germany, Italy, and Russia, for example, have established economic councils which may assist in such work. Bills have been introduced in Congress to provide some such organization. The British Royal Commissions, as well as special expert groups in other countries, do valuable work of this kind.

CHAPTER XII

LEGISLATIVE STRUCTURE

Probably no other part of the governmental machine receives so much adverse criticism today as does the legislature. If we seek the reasons for the widespread dissatisfaction with the legislature, we find them quite complex. The first undoubtedly is the fact that never before in the history of the world has the law-making body of any country been confronted with such tasks as confront all legislatures today. The present is an era of rapid economic, social and political changes, which are accompanied and to a considerable extent caused by physical changes—discoveries, inventions, changes in the size and composition of the population of every country—all of which necessitate innovations in government. The business and financial relationships of today are more complex than ever before in history.

All these various changes demand not only individual adaptations, but also new methodologies and increased spheres of activity on the part of the government. It is inconceivable that radio, for example, could be operated satisfactorily without governmental regulation, and the invention of the airship means new tasks for the legislature. It has been demonstrated throughout the world that a laissez-faire economy is not solving the problem of unemployment, and cannot solve the problem of poverty. Society long ago decided that the legislature must accept the task of establishing the principles controlling such diverse matters as education, large-scale commerce, sanitation, child labor, and various forms of social insurance. New problems are constantly arising, which evidently cannot be solved except by legislative action. The vast and difficult labor of solving these problems is increased by the fact that legislators, like other members of society, can seldom change their ideas and attitudes with a sufficient rapidity to keep pace with events.

Consequently the laws are often inadequate solutions. In time their inadequacy is recognized, but before a remedy is agreed upon, conditions have changed again.

Such is the situation which any member of a legislative body faces when he enters upon his office. But this is only a part of his difficulty. He is confronted with a multitude of conflicting interests: interests that wish to exploit the public domain and interests that wish to conserve it; interests that thrive at present because they control their special conditions, and opposing interests which are seriously injured by the present situation; the interests of the manufacturer, which may conflict with those of the laborer; the interests of the farmer, which may run counter to manufacturing interests; sectional interests of various sorts; incompatible religious and cultural interests; military interests that may conflict with peace interests; the interests of importers versus the interests of exporters. Each of these interests seeks to secure legislative action favorable to itself, too often regardless of the effect upon society as a whole. The legislator, however honest, may well be completely bewildered by the conflicting arguments offered by the lobbyists who represent these many opposing interests.

This does not end his difficulties. In order to be elected, the legislator must be supported by a party, which in turn expects him to support it. The legislator often discovers that he is merely a pawn in a continuous political game, played almost like a game of chess. His moves are seldom ideal moves, but generally moves designed to check and block the other party, or the opposition candidate. If he rebels against this situation, he is rejected by his party, and his functions as a legislator are ended. Even when he is able to act independently concerning matters on which his party does not take a definite stand, his action may be ill-advised. But it is not the pressure of conflicting interests alone that makes the work of the legislator difficult and partly ineffective—the vast and ever-enlarging range of subjects on which he must act serves to preclude the possibility of his possessing the information, judgment and social vision to cast his vote wisely in every instance. He is constantly faced with problems to which he has given little

thought or study. The very language of many problems which he must assist in solving is new to him. Has he studied the valuation of public utilities? Does he possess clear ideas as to the incidence of taxation? Does he know the complex problems of personnel administration? If he wishes to study these and a thousand other questions, where can he secure information concerning them? Does any body of information exist? If it does exist, is it available? Is it unprejudiced? If correct information can be secured, will partisan or other controls prevent it from being useful?

The work of the legislator is by no means confined to studying proposed legislation and voting upon it. Even in countries where the Cabinet takes the lead, any member may prepare and introduce a bill. In the United States it is hardly possible for any member of either House of Congress to avoid doing so. This may become a heavy burden, even though assistance of various sorts is provided—not forgetting the assistance of the ever-present lobbyist, with the prepared bill for which he seeks a sponsor. Most bills are introduced and forgotten; those which receive any serious consideration are likely to become the subjects of much barter and of compromise.

In all countries the legislature exercises some degree of control over the administration. This means questions, investigations, reports, discussions, and hearings without end.

The functions of the administrator can be divided and subdivided; but there seems to be no way at present of dividing and subdividing the work of members of the legislature. Some steps have been taken in this direction, however, as will be seen later. It is probably indispensable to any adequate performance of the numerous tasks belonging to the legislature, and the restoration of this organ of the government to the position of respect and confidence which it formerly occupied, that methods be devised for improving the position and lightening the burden of the individual member. The probable nature of such methods, as well as the larger question whether it is possible for the legislature to regain such a position, must be left until the present composition and functions of several different legislative bodies have been considered.

The Basis of Representation in the Legislature

In many countries, notably France, England, and the United States, there are two Chambers of the legislature, chosen by different methods and representing somewhat different interests or groups. These countries are said to have bicameral legislatures. The origin of the various Chambers can be traced in part to historical circumstances, and in part to theoretical considerations.

GREAT BRITAIN. The bicameral legislature of Great Britain, known as Parliament, has had a curious history. The Anglo-Saxon "council of sage men," or *witenagemot*, exercised under the early Kings not only legislative powers, but functions of administration and adjudication. William the Conqueror displaced this by a royal council (*curia regis*), composed of certain nobles and the highest ecclesiastical and civil officers, who exercised quite limited powers, chiefly judicial. From this time until 1215, when Magna Charta was forced upon King John, some sort of assembly met occasionally, in which the nobles and the clergy were represented. The powers exercised by this assembly varied according to the relative strength of the Parliament and the monarch. The latter always encouraged it to vote grants of money, but frequently objected to any proposed legislative action which limited the royal prerogative.

Between the reigns of King John and Queen Elizabeth, however, the position of Parliament had become quite strong, and the Stuarts resisted it to their undoing. The revolution of 1688 left Parliament as the most powerful factor in the government, with legislative powers, control over the executive, and certain high judicial functions.

The composition of Parliament underwent several changes. As early as 1213, King John had held a council in which not only the nobles and the clergy but also the commoners were represented. This was the Council of St. Albans. The representation was in part territorial. Several later Assemblies recognized the territorial basis for representation in the Commons. Thus, the Assembly summoned in 1265 by the Earl of

Leicester, Simon de Montfort, included two knights from each shire and two citizens or burgesses from each of twenty-one selected cities or boroughs.

The "Model Parliament" of Edward I, which met in 1295, continued the double basis of representation by position or "estate," and by location. Five "estates" were represented here: the higher clergy, the minor clergy, the nobles, the knights and smaller freeholders, and the burgesses. In about forty years (by 1332) the minor clergy had dropped out of the picture, and two separate houses had been formed: the House of Lords, representing the higher clergy and the nobles; and the House of Commons, representing the knights, freeholders, and burgesses.

At this time there was no clearly recognized principle of hereditary membership in the House of Lords. Those who composed it were summoned by the King. Certain powerful families naturally expected the current holder of the hereditary title to be summoned to every Assembly; and in the seventeenth century the House of Lords decided that when an individual had received and obeyed a special writ of summons, he and his successors were entitled to sit in the House.

The House of Commons developed into a body elected on a territorial basis, by a very restricted electorate. Custom decided which cities and boroughs might elect representatives; a great many of these were little more than small towns attached to great estates, each one certain to elect the candidate favored by the peer or important gentleman who possessed the estate. These "pocket boroughs" or "rotten boroughs" became a source of scandal. This fact, and the dissatisfaction of large cities which were not represented in Parliament, led to a series of reforms in the nineteenth century. The first of these, the famous Reform Bill of 1832, increased the electorate, and gave representation to the cities, at the same time depriving about fifty-six "rotten boroughs" of the right to send members to the House of Commons. In 1867, 1885, 1919, and 1928, the franchise was greatly extended, until today the House of Commons is elected by all men and women over twenty-one years of age who fulfil certain qualifications of residence.

At present the House of Lords includes the following groups: certain peers who inherit the right to a seat—by no means all the peers; certain newly created peers on whom this privilege is bestowed (as, for example, the late Lord Haldane); certain “lords spiritual” and high civil dignitaries whose right to a seat in the House of Lords is bestowed and withdrawn together with the offices which they hold; and Scottish and Irish peers. The basis of representation, although it sounds confused, is obviously high position, either inherited or acquired.

The House of Commons is far more nearly the representative of the people as a whole. Certain members are elected by boroughs, others by counties, and a few by universities. What results have followed from the wide difference in the basis of representation of the two Chambers will be indicated later.¹

THE UNITED STATES. The framers of the Constitution of the United States had the pattern of the English Parliament before them. They seem to have assumed the advisability of a bicameral legislature. Many of them were familiar with Montesquieu's *L'Esprit des Lois*, which praises this institution highly; but it was probably conservatism, and custom, together with the desire to check democracy, that led them to establish two houses.

In Madison's report of the debates of the Constitutional Convention, the very significant notation is given:

In Committee of the whole on Mr. Randolph's propositions. The 3^d Resolution, “that the national Legislature ought to consist of two branches” was agreed to without debate or dissent, except that of Pennsylvania, given probably from complaisance to Doc^r. Franklin who was understood to be partial to a single House of Legislation.²

Mr. Mason held that the lower branch of the legislature was to be the “. . . grand depository for the democratic principle

¹ See G. B. Adams, *Constitutional History of England* (New York, 1921); A. F. Pollard, *The Evolution of Parliament* (New York and London, 1920); A. B. White, *The Making of the English Constitution* (New York and London, 1925), 2d ed.

² C. C. Tansill, *Documents Illustrative of Formation of the Union of the American States* (Washington, D. C., 1927), pp. 124-125.

of the Govt. It was, so to speak, to be our House of Commons—it ought to know & sympathise with every part of the community; and ought therefore to be taken not only from different parts of the whole republic, but also from different districts of the larger members of it, which had in several instances particularly in Virg^a, different interests and views arising from difference of produce, of habits, &c, &c. . . . We ought,” he said, “to attend to the rights of every class of the people. He had often wondered at the indifference of the superior classes of society to this dictate of humanity & policy;”³

The Senate was not only to be an organ to represent the States as such, but by its indirect election, and its relatively small number of members, it was planned as a check upon democracy. Mr. Randolph “. . . observed that the general object was to provide a cure for the evils under which the U. S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought for agst this tendency of our Governments: and that a good Senate seemed most likely to answer the purpose.”⁴

The House of Representatives was finally planned as a popular Chamber representing every class of the citizenry, with members chosen on a basis partly territorial and partly numerical. The Senate was intended to represent two separate interests: first, the member states; second, the aristocratic and propertied classes of the people.

FRANCE. The theoretical basis of the bicameral legislature established by the Constitutional laws of 1875 was almost identical with the theory held by the fathers of the Constitution of the United States: the belief that it was necessary to provide for a body which would check the excesses anticipated and feared in a lower House elected directly by the people. As in the United States, there was a secondary motive in organizing the Senate. This body was originally given seventy-five perma-

³ *Ibid.*, pp. 125-126.

⁴ *Ibid.*, p. 128.

nent members, as a device for attracting the support of the more conservative political groups.⁵

Certain French political scientists also defend the establishment of a two-chambered legislature on other grounds. Moreau defends it for several reasons.⁶ He believes that in practice the bicameral legislature in France has given much more satisfaction than a unicameral legislature would have done, largely because the creation of a second Chamber gives representation to elements which would not normally be placed in the legislative body merely on the basis of number of votes. These various elements in the legislature tend to maintain the established order of things as against the tendency to change found in the lower House. Again, by dividing up the legislative power between two Chambers, the executive is protected against an overwhelming weight of power held in the hands of an undivided legislature. Moreau claims that the two Chambers mutually control each other, balance each other, and moderate each other's actions. With two Chambers, surprise votes are not possible, and conflicts with the executive are rarer and more easily settled. Preparation of the laws is a delicate matter, "which requires reflection, a relative slowness, attentive and repeated examination." The Chambers guarantee all of these things. It should be remarked that there are French authors who do not at all agree that a bicameral legislative body is necessary in France. Duguit says that "in a unitary state, this system (the bicameral system) has no reason for existence."⁷

The Relationships between the Two Chambers

THE ENGLISH PARLIAMENT. The Commons originally had little power. Economic and political factors gradually increased the influence of the lower House until today it is far more important than the so-called upper House, which in reality continues to exist at all only by tolerance. The formula used in making parliamentary grants now reads: "By the Commons

⁵ See G. Jèze, *Éléments du droit public et administratif* (Paris, 1910), p. 14.

⁶ F. Moreau, *Précis élémentaire de droit constitutionnel* (Paris, 1921), 9th ed., pp. 134ff.

⁷ L. Duguit, *Traité de droit constitutionnel* (Paris, 1923), Vol. II, p. 551.

with the advice and assent of the Lords Spiritual and Temporal." The control of policy is primarily in the Commons.

THE UNITED STATES. The Senate has equal legislative powers with the House of Representatives, except in respect to the initiation of money bills. The Senate alone possesses certain important administrative powers of approving appointments and ratifying treaties.

In practice the power of the Senate is undoubtedly greater than that of the House of Representatives. This is due to several factors. Because the Senate is much smaller than the House of Representatives, each member of the former body can discuss any question at proportionately greater length. Again, since Senators are elected from entire States rather than small districts, the chances are that they will have more political experience, education, and knowledge of public business than the members of the lower House possess. The very fact that they are chosen from the State at large gives them power, prestige, and influence. Since Senators are chosen for a much longer term than members of the House of Representatives, they are not so dependent upon sudden political changes, and therefore not quite so subject to petty party control.

FRANCE. The National Assembly that created the present Constitution contemplated an equality between the Senate and the Chamber of Deputies. Except in regard to revenue and supply measures, it gave the two Houses the same powers of legislation. It is true that in France, as in the United States, "money bills must first be introduced in and passed by the Chamber of Deputies." This distinction, in and of itself, would not seem to create a very serious limitation upon the upper House. It has not limited the power of the United States Senate to any appreciable extent, for through the process of amendment the Senate may strike out all that follows the enacting clause of the House revenue bill and substitute its own bill. The effect in France, however, has been quite different.

The French Constitution provides that the ministers shall be responsible to both the Chambers. This gives the Senate a power not possessed by all upper Houses. Moreover, only with

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the consent of the Senate are the ministers able to dissolve the Chamber of Deputies and appeal to the people against the opposition in either House. There is no question that a Cabinet which is unable to carry its measures through the Senate must either accept the defeat of its bills or resign. Dr. Sait believes that the reason why the Senate in France has not been able to reach a position of superiority, and has indeed become very much inferior to the Chamber of Deputies in general power, is traceable "first of all to the fact that the Chamber of Deputies, as the direct offspring of universal suffrage, is invested with a peculiar prestige, an inherited sanctity, which not all of its shortcomings can wash away; and in the second place to the fact that cabinet government requires the ascendancy of one Chamber because ministers cannot obey at the same time two different masters with conflicting wills."⁸

It is doubtful whether these factors are sufficient to account for the difference. If the first contention were true, why does not the House of Representatives in the United States have the upper hand? There is undoubtedly much weight in the second argument; but even so, the question might possibly be raised, why does not the Senate become the master rather than the Chamber of Deputies? One instance of the superior power possessed by the Chamber of Deputies is the practice of the latter in regard to financial measures. It not only initiates these, but it takes such a long time in debating them that the Senate has little time left for introducing amendments or even debating the bills thoroughly, before they must be passed in order to make necessary funds available as the new fiscal year begins. In the United States this practice is reversed—the Senate does not send an amended bill to the House until near the close of the session. This is the history of rivers and harbors bills, for instance.

Selection of the Members of the Lower House

THE UNITED STATES HOUSE OF REPRESENTATIVES. The federal Constitution fixes the qualifications of members of

⁸E. M. Sait, *Government and Politics of France* (Yonkers, New York, 1926), p. 135.

both Houses of Congress. The qualifications for membership in the House of Representatives are as follows:

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States; and who shall not, when elected, be an inhabitant of that State in which he shall be chosen. Representatives are chosen every second year by the people of the several States. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. Two amendments to the Constitution provide certain general restrictions in respect to State action. Under the Fifteenth Amendment, a State may not withhold the right of voting on account of race, color, or previous condition of servitude; and under the Nineteenth Amendment, it may not withhold the right to vote on the ground of sex. Within these general limits, suffrage qualifications vary considerably from State to State. Some States, in order to eliminate the Negro voters, have established educational qualifications that may be so applied by election judges and other officers as almost to preclude voting by the Negroes. In all States, only citizens of the United States can vote for members of Congress. In some States taxpaying qualifications exist. The periods of residence necessary for the right to vote differ. There are notable differences in registration requirements.

The Representatives are apportioned among the States "according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Although the Fourteenth Amendment provides for reduction of the representation of any State which withholds voting privileges from adult male citizens of the United States except for participation in rebellion or other crime, many States as a matter of fact do withhold such privileges. Because of political reasons, because of the failure of the injured citizens to bring suits except in a very few instances, and because the Supreme Court has on the whole taken a conservative attitude, little has been done to correct this situation.⁹

⁹ The "grandfather clause" has, indeed, been declared unconstitutional by the Supreme Court.

The federal Constitution does not fix the method of choosing Representatives except to provide that they must be "chosen every second year by the people of the several States," and that the times, places, and manner of holding the elections shall be fixed by the State legislatures, subject to the right of Congress to make or alter such regulations. Since, at first, Congress left the States free to formulate their own systems, great differences naturally appeared. In some States all the Representatives were elected on one State-wide ballot; in others, they were elected individually from separate districts. In the Reapportionment Act of 1842, Congress provided that every State entitled to more than one Representative should be divided by the legislature into districts composed of contiguous territory, and equal in number to the State's quota of Representatives, and that each district should elect only one Representative.¹⁰ In order to avoid the inconvenience of altering the congressional districts whenever a State might find itself entitled to send additional Representatives to Congress, provision was made by another federal law for the (optional) choice of such additional members by the people of the entire State, as Congressmen-at-large.¹¹ In most States, however, redistricting is done whenever such a contingency arises.

The original purpose of the district system was to afford some opportunity for members of different parties to be sent to Congress, since it might be expected that the districts would vary in political complexion, whereas a party victory for a State-wide ticket would leave the losing party entirely without representation. The State legislatures, however, to whom is left the establishing of the districts, have usually been able to plan them so that the majority party in control of the legislature would secure a safe majority of the congressional Representatives. Where the Democrats are in control they draw the boundaries of the districts in such a way that the Republican voters are scattered so that they control no districts at all, or if this is impossible, are concentrated into a few districts, whereas the Democrats are distributed with secure majorities in the

¹⁰ 5 *Stat.*, p. 491; *Mason's Code*, Ch. I, Title 2, Sec. 3.

¹¹ *Mason's Code*, Ch. I, Title 2, Sec. 4.

remainder. Where the Republicans are in power, they manipulate the districts in order to bring about the opposite result. This system of "gerrymandering," so-called from a Mr. Gerry to whom is credited the doubtful honor of inventing it, is acknowledged to be an abuse, but since it is within the letter of the law, no way of guarding against it has been devised.

THE ENGLISH HOUSE OF COMMONS. The only persons chosen for office by means of national elections in England are the members of the House of Commons. The law does not fix their term of office directly; it does, however, provide that the maximum life of Parliament shall be five years. Parliament may prolong its own life, as it did during the World War in extending a session by special act three years beyond the maximum fixed by law.

The English system means that the House of Commons alone is kept in harmony with public opinion through elections.¹² As Sir Erskine May remarks: "It must not be forgotten that although Parliament is said to be dissolved, dissolution extends, in fact, no further than to the Commons. The Peers are not affected. So far, therefore, as the House of Lords is concerned, the creation of peers by the Crown on extraordinary occasions is the only equivalent which the Constitution has provided for a change and renovation in the House of Commons by dissolution. In no other way can the opinion of the House of Lords be brought into harmony with those of the people."¹³

Formerly Parliament was dissolved only by royal decree, or upon the death of the Sovereign. In 1867, by the Reform Act, the duration of Parliament was made entirely independent of the death of the Sovereign. The other method of dissolution still remains, but it is actually the ministry that determines when dissolution shall take place.¹⁴ After an appeal to the

¹² See Ramsay Muir, *How Britain is Governed* (New York, 1930), pp. 171 ff., for the view that even the elected House of Commons may not reflect the will of the people.

¹³ T. E. May, *A Treatise on Parliament* (London).

¹⁴ See Herman Finer, *The Theory and Practice of Modern Government* (New York, 1932), pp. 666 ff. This author sums up the generally accepted causes for dissolution as: deadlock; conviction of the government that it is not trusted by the country; and desire to consult the country upon an important new policy.

country has been decided upon, a royal proclamation dissolves the two Houses and states "the desire of the King to have the advice of his people in Parliament."

The members of the House of Commons are elected chiefly from single-member constituencies, by the votes of all men and women who have reached the age of twenty-one years. A few constituencies send more than one member, and a few persons have more than one vote.¹⁵ There are 615 members in the House of Commons; the constituencies are arranged, as nearly as possible, so that about 50,000 votes elect one member.

It is not considered necessary that the member of Parliament elected by any constituency shall reside within the geographical boundaries of the same. Although there is no limitation upon the number of candidates, it seldom happens that more than two or three persons contest the same seat—partly because there are relatively few parties in Great Britain, and partly because the election laws compel every candidate to forfeit a considerable sum unless he receives at least one-eighth of the votes cast. When, as occasionally happens, an important man in one of the larger parties is defeated in his own constituency, the successful candidate in some constituency which will certainly support that party is prevailed upon to resign, and the important personage is then elected to fill the vacancy. By this means, most of the leading figures in each large party are sure of seats in Parliament, year after year, even when their respective parties have met defeat. Naturally, this method sometimes fails.

Electoral campaigns are carried on in much the same way as elsewhere. Printed materials, advertisements and posters, public meetings and speeches, and house-to-house canvassing are the methods generally employed. Since most Parliaments are dissolved on special issues, these, as well as the general policies of the respective parties, are hotly debated.

✓ THE FRENCH CHAMBER OF DEPUTIES. The Chamber of Deputies is elected by universal male suffrage, by French citizens who have completed their twenty-first year of age, who

¹⁵ For details see Muir, *op. cit.*, p. 157.

are duly registered, and who are in full enjoyment of their civil and political rights. At present each department constitutes an electoral district. The voters in these districts are called the Electoral Colleges. Whenever there is to be an election for the Chamber of Deputies, the Electoral Colleges are summoned to the polls.

The entire Chamber of Deputies is renewed quadrennially at a general election, which must take place within the sixty days preceding the end of each regular four-year term.¹⁶ Any vacancies which may occur in the Chamber of Deputies must be filled by a local election within three months. By way of exception to this rule, vacancies which occur during the last six months previous to a general election remain unfilled until this election takes place. In case the Chamber of Deputies is dissolved by the Government, an election must be held within two months. By a law of July 21, 1927,¹⁷ the number of Deputies was fixed at 612.

The election system of France has undergone several changes within the last few years. Deputies were formerly chosen by *scrutin d'arrondissement*; that is, one candidate was chosen from each arrondissement, or small voting district, comparable to the congressional districts in the United States. In 1919 the department was made the electoral district, and the electors voted for a list of candidates equal to the entire representation of the department in the Chamber of Deputies. This system is called *scrutin de liste*, a form of proportional representation. It was hoped that by the latter method the choice of candidates would be less local and less personal, and that greater stress would be placed upon political issues than upon men. It was also believed that the electors of a larger constituency would be more free from various sorts of official and personal pressures. After about eight years under the system of *scrutin de liste*, the older system was restored in 1927.

At present the law provides for two elections. At the first of these, no candidate is declared elected unless he has received an absolute majority of the votes cast, and a number of votes

¹⁶ Law of June 16, 1885, Art. 6.

¹⁷ Art. 2 with annexed table.

equal to at least one-fourth of all the voters registered. The second election, if needed, is held on the Sunday following the announcement of the results of the first election. At this second election a plurality is sufficient.¹⁸

At least twelve days before the first election and three days before the second, a Committee composed of the candidates in the field, or their representatives, is formed at the seat of government of each department. The presiding officer of the Committee is the president of the civil court, or a judge appointed by him. The chief clerk of the court acts as secretary, and the head receiver of the postal service also serves on the Committee, completing the official portion thereof. This Committee prints and distributes ballots and campaign circulars. Two ballots for each candidate, and if desired, a circular, may be sent to each elector in a sealed envelope which is sent post free. Other ballots are sent to every town hall for distribution at the polls, and still others are placed at the disposal of the candidates who request them. The Committee determines the total cost of carrying out the above plan, and each candidate pays his share.

In order to be eligible as a member of the Chamber of Deputies a person must be an elector, in possession of his full civil rights, who has completed his twenty-fifth year. The list of ineligible persons includes members of the army or navy in active service; persons belonging to families which have formerly reigned in France; and persons who, after having been elected to either Chamber, have been declared ineligible because of corrupt practices defined in the laws, and have been condemned to suffer the penalties provided for such practices.¹⁹ Certain public officers of high rank are ineligible in "the arrondissement or the colony included in whole or in part within their sphere of authority, during the exercise of their functions and during the six months which follow the cessation of their functions through resignation, dismissal, change of residence, or in any other manner."²⁰ The purpose of this provision is

¹⁸ Law of July 21, 1927, Arts. 1, 2, 3, 4.

¹⁹ Organic Law of November 30, 1875, Arts. 6 and 7; Law of June 16, 1885, Art. 4; Law of March 31, 1914, Art. 6.

²⁰ Organic Law of Nov. 30, 1875, Art. 12; Law of March 30, 1902, Art. 2.

to prevent the misuse of official power and prestige by a high officer in order to bring about his own election. This ineligibility, it should be noted, is purely local; and if an officer affected by it wishes to be a candidate in any other arrondissement, with which he has no official connection, he is perfectly free to do so. Although civil servants are generally eligible for election as deputies, they may not draw two salaries at once from the public treasury, and must, therefore, if elected, choose between their office and membership in the legislature. There are certain exceptions to this rule.

The Selection of the Members of the Upper House

THE UNITED STATES SENATE. Although there seems to have been quite general agreement in the Constitutional Convention that the Senate should represent the wealth and aristocracy of the nation, there was much disagreement as to how its members should be chosen. Dickinson moved that the national Senators be appointed by the State legislatures, "because the mind & body of the several States shd. be represented in the national Legislature; and because these Legislatures would choose men of distinguished Talents as Senators."²¹ Wilson proposed that the Senators should be elected by the people, and that for this purpose the territory should be formed into convenient divisions or districts. Mason was afraid that the national legislature would swallow up the legislatures of the States. "The Protection from this Occurrence will be the securing to the States Legislatures, the choice of the Senators of the U. S."²²

It was finally agreed that to offset the preponderant control given the larger States in the House of Representatives, each State should have an equal number of Senators, which were to be elected indirectly, by the State legislatures, for a term of six years. The Senators were to be divided into three groups, the terms of which should expire at different times, so that one-third of the Senators should be elected every second year. In practice it was arranged that the two Senators from each

²¹ Tansill, *op. cit.*, p. 852 ff.

²² *Ibid.*, p. 854.

State should never be placed in the same group, so that their terms never expire at the same time.

For three-quarters of a century, this system, as adopted at the time of the framing of the Constitution, remained in effect. Due to frequent controversies over the election of Senators, Congress in 1886 passed an Act which regulated the time and manner of holding senatorial elections. According to this Act, the last legislature of a State which was elected prior to the expiration of the term of a United States Senator from that State, was to proceed to an election of federal Senators on the second Tuesday after it was convened. Both Houses should take a *viva voce* vote, and any person receiving a majority in each House should be declared elected. In case no one received such a majority, the House was to meet in joint session at twelve o'clock on the following day to take a *viva voce* vote. In case no election then took place, the process should be repeated, at least one vote being taken each day, excepting Sunday, until a Senator was elected. This arrangement was not very satisfactory. The people felt that "bosses" could dominate the State legislatures, and elect their own men. When this was not the case, quite often the State legislature wrangled for months over the choice of a Senator. At times bribery played a part in the situation.²³

At last the Seventeenth Amendment to the Constitution of the United States, which became effective in 1913, provided for the election of Senators by the people of the various States. The electors in each State must have the same qualifications required for electors of the most numerous branch of the State legislature.

This amendment also made a change in the method of filling vacancies in the Senate, due to resignation or other causes, before the end of the regular term of office. Formerly the executive (governor) of the State, entitled to fill such a vacancy, made a temporary appointment if the legislature were not in session; the legislature made the permanent appointment in the regular manner. Under the Seventeenth Amendment a popular election must be held to fill a vacancy: "*Provided*, that

²³ See G. H. Haynes, *The Election of Senators* (New York, 1906), Ch. II.

the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

THE ENGLISH HOUSE OF LORDS. At the present time the House of Lords is a body of about 750 members, that is, a Chamber considerably larger than the House of Commons. The size of the House of Lords has increased with surprising rapidity during the past fifty years. In this time it has been enlarged by about 450 members. In other words, more than one-half of the members of this supposedly august body hold titles which are less than 50 years old.²⁴

There are five distinct elements in the membership of the House of Lords. The first group, and the smallest, numbering at present only two members, is composed of the princes of royal blood, who do not engage in political activity and take no part in the active business of the House.

Next come the hereditary peers, of whom there are rather more than 650, not counting those under age who cannot participate in the work of Parliament. Hereditary peerages descend under the rule of primogeniture, although not all titles carry with them the right to a seat in the House of Lords. The Crown has unlimited power in the creation of peers. It is generally understood that many of the recent peerages have been conferred at the suggestion of the government in power, as rewards for faithful service to a political party, often for contributions to party funds. The House of Lords has thus become the stronghold of the wealth of the country. Of course many persons of importance in the world of government, law, letters and science are also given peerages, such as Sidney Webb, Bryce, Haldane, Asquith, and others.

The third class consists of forty-four representative peers of Ireland and Scotland. The fourth class consists of lords spiritual, including two Archbishops and twenty-four bishops. These sit only for the term of their episcopate. By statute, the Archbishops of Canterbury and of York, and the bishops of London, Durham and Winchester, are always entitled to a sum-

²⁴ Muir, *op. cit.*, p. 249.

mons to Parliament. Of the remaining twenty-eight bishops of the Established Church, the twenty-one who have been longest in office sit in the House of Lords. When a bishop who is a member of this House dies or resigns, the bishop next in order of seniority is entitled to the vacant seat.

Finally, there are law Lords, who are elected for life. One of the functions of the House of Lords is to serve as a final court of appeal in special cases from the lower courts in England, Scotland, and Northern Ireland. The law Lords are given their seats because it is necessary to have certain persons with a good judicial training, to participate in the work which the House of Lords performs as the supreme law court. The law Lords include, in addition to the six who are especially appointed, the Lord Chancellor and other members of the House of Lords who have held high judicial office. Although in theory any member of the Lords may participate in the judicial function, in practice only the judicial members do so. The six Lords in appeal ordinary, as a matter of fact, do most of the work connected with the judicial business. The decisions are rendered in the name of the House by any three of the law Lords.

THE FRENCH SENATE. By the law of February 24, 1875, on the Organization of the Senate, the number of Senators was fixed at 300. Of these, 225 were to be elected by the departments and colonies, through Electoral Colleges composed of deputies, general councillors, and district councillors, and one delegate elected by each municipal council. These 225 were to be elected for a nine-year term, and one-third of them were to be renewed every three years. The remaining 75 Senators were to be elected by the National Assembly with permanent tenure. Vacancies in this latter group, from whatever cause, were to be filled by the Senate itself.

These 75 permanent Senators were looked upon as an embodiment of the aristocratic principle, even though their seats were not hereditary. The more devoted republicans, therefore, brought about the necessary constitutional changes and legislative enactments leading to the abolition of life tenure in the

Senate, and providing that vacancies occurring among those permanent Senators already in office should be filled by the ordinary methods of election.²⁵

At the same time the provision that each municipal council should send one delegate to the departmental college was abolished. This provision had given the small communes as great voting strength as the large urban centers, and had likewise favored the conservative rural group and injured the liberal (urban) group. The new law provided for delegations from communes, which should vary according to the size of the municipal councils; this, in practice, meant roughly according to the population of the communes. Some changes were also made in the allotment of senatorial seats among the departments and colonies.

As a result of these changes, which are still in force, all Senators are elected for a nine-year term. One-third of the total number of Senators is renewed every three years. The various departments (and colonies) elect their Senators by means of Electoral Colleges composed of the members of the Chamber of Deputies from the given department, general councillors, district councillors, and representatives of the municipal councils, varying in number according to the size of the latter. The number of Senators to which a department is entitled varies from two to ten, according to population.

The World War caused indirectly an increase in the size of the Senate, by the addition of fourteen members from the departments of Alsace-Lorraine.²⁶

The exact date for each senatorial election is fixed by a presidential decree, at least six weeks in advance. The date is the same for all Electoral Colleges.

One may not become a Senator unless he is a French citizen of at least forty years of age, and in possession of his civil and political rights. Members of families that have reigned in France are not eligible. The law of incompatibility is much the same as in respect to the Deputies.

²⁵ Constitutional Amendments of August 14, 1884, Art. 3; Law of December 9, 1884.

²⁶ Law of October 17, 1919.

CHAPTER XIII

THE FUNCTIONS OF THE LEGISLATURE

The Powers and Functions of Legislative Bodies

The functions of a legislative body, as a rule, fall into several categories. The first and most fundamental duty of all legislatures is the enactment of laws. A function so closely related to law making that it is often considered a kind of subdivision thereof, is the appropriation of public funds for various uses. Again, legislatures may control the administrative authorities to a greater or lesser degree. The extent of this control will depend upon the governmental system. When a separation of powers is established on the order of that set up in the United States, there is obviously less possibility of legislative control than under a parliamentary system. In the next place, the legislature enjoys quite a large rôle in the organization of administration. This, again, depends upon constitutional provisions, and upon the relationship of the legislature to the executive and administrative authorities. For some purposes the legislative body may have certain executive functions, such as the power of appointment, removal, giving consent to executive action, and so on. The legislative body may act as a court under certain conditions, particularly in the process of impeaching officers. Most legislative bodies have large powers of investigation, for the purposes of gaining information regarding proposed laws, of controlling the administration, and of serving the general public welfare. Practically all legislatures have some part in making or amending the constitution of the state which they serve.

Powers and Functions of the Congress of the United States

In the United States both the House of Representatives and the Senate possess such legislative powers as are definitely

bestowed upon them by the Constitution. In theory these powers are equal, except that money bills must be introduced first into the lower House. The legislative powers include both the initiation of bills and the enactment of the same into law. The initiative is not, as in parliamentary countries, left largely to the Cabinet, but belongs only to the members of the legislature.

✓ CONTROL OVER ADMINISTRATION. There are several ways in which the Congress of the United States controls administration. In the first place, it does so through its powers of organization. It is Congress that organizes the departments of the government, their bureaus, commissions, and so on. It exercises far more power in this respect than does the legislature of England, France or Germany, where the power of administrative organization, because of constitutional provisions, law or custom, is exercised chiefly by the Cabinet. Even if Congress had the constitutional power to leave a large part of the administrative organization to the President, or the Cabinet, it would not be likely to do so in practice, for this is one of its chief methods of control over administration. Since the President is coordinate with the legislature rather than subordinate to it, Congress will not surrender such power as it has over the administration. It therefore organizes the administrative machinery in considerable detail.

✓ In the second place, Congress controls the administration through its power over finance. It cannot only transform or do away with an administrative body which does not conform to the requirements placed upon it, but it can also cut off the appropriations, partially or entirely, for such agency. A particular function may be cut off, or so little money may be given for it that it cannot be carried on successfully. By making detailed appropriations it is entirely possible for Congress to dictate the work to be done by the different departments of the government.

✓ Again, Congress may exercise a good deal of control over the administration through its power of investigation. This is a weapon which it can use to good advantage, if it wishes, to

keep the administration within legal bounds. This power has been very valuable, particularly if one or both legislative Houses were not of the same political party as the President, and had consequently no desire to hide the shortcomings of the administration for political reasons. Undoubtedly this power is used much oftener in the United States than where the legislature has the opportunity, through questioning the ministers on the floor of the Chambers, to control the administration more continuously.

✓ **ADVISORY FUNCTIONS.** In the United States, the Senate assists the President in an executive capacity, in confirming appointments and approving treaties. These two powers are very important. As it has worked out in practice, it is the Senators who virtually appoint many officers of the United States, such as district attorneys, postmasters, and federal judges, and the President who virtually gives consent. The Senate may even exercise great power in respect to the appointment of members of the Cabinet, judges of the Supreme Court, and ambassadors and other public ministers, by refusing to ratify appointments, because it does not approve the record of public service, or even the economic, social and political views of a person chosen by the President to fill a given office. In England, France and Germany, the legislative bodies do not have any direct power over appointments. They may, however, exercise a very great indirect power by removing the Cabinet, or a minister within the Cabinet, in case they do not approve of these persons, or of persons appointed by them.

✓ **JUDICIAL FUNCTIONS.** Congress possesses the power of impeachment. The Constitution of the United States provides that: "The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, Treason, Bribery, or other high crimes and misdemeanors."¹ Impeachment begins in the House of Representatives, where, when charges are made against a civil officer,² a committee of the House is appointed to make an in-

¹ Art. II, Sec. 4.

² Military and naval officers are tried by court martial, not impeached.

vestigation. When the committee makes its report, the House decides whether the charges are sufficiently serious and well substantiated to warrant the formulation of articles of impeachment. If the House so votes, the charges are sent to the Senate, which is obliged to try the matter in due form. During the trial the Senate sits as a court. A two-thirds vote of the Senate is required to convict the person under impeachment.³

CONSTITUENT FUNCTIONS. Finally, the Congress of the United States exercises a certain power as a constituent authority. Unlike many other legislatures, Congress only shares this power; nevertheless it is very important, since in practice Congress is the authority which proposes amendments to the national Constitution. Congress prescribes whether proposed amendments shall be ratified in the several States by the legislatures or by conventions. It also has the power, never yet exercised, to call a convention for proposing amendments, upon the application of the legislatures of two-thirds of the several States.

The Functions of the English Parliament

Originally Parliament had no power to make laws. This power belonged exclusively to the King, and the most that either House of Parliament could do was to petition the King for specified laws on certain important subjects. The fact that the King could refuse, or even when complying could make laws that were not in accordance with the ones requested, led to a demand, especially by the House of Commons, for a share in law making. It was not, however, until the fifteenth century that the two Houses really became legislative bodies. Even today laws are theoretically made by the Sovereign, but in reality they are made by Parliament.

LEGISLATIVE PROCEDURE. Although the House of Commons and the House of Lords share the function of law-

³ See R. Foster, *Commentaries on the Constitution of the United States* (Boston, 1895); D. Y. Thomas, "The Law of Impeachment in the United States," *American Political Science Review* (May, 1908), Vol. II, No. 3, pp. 378-395. For a vivid description of the impeachment trial of President Johnson, see C. G. Bowers, *The Tragic Era* (New York, 1929).

making, the real power rests with the Commons. The Parliament Act of 1911 denies to the House of Lords any but the shadow of authority over money bills. These bills, as passed by the House of Commons, may also be passed without amendment by the House of Lords; but whether approved or rejected by the Lords they become law in the form in which the Commons adopted them. The House of Lords may reject public bills other than money bills for two successive sessions, but any such bill passed by the House of Commons for the third time (in successive sessions, with an interval of two years between the first and the third action) after two rejections by the House of Lords, is not sent again to the latter, but becomes law.

The normal course for a bill is: passage by both Houses of Parliament, then the formality of the "royal assent," and the bill is law. Actually, since the House of Lords can only delay, and not finally throw out, a bill consistently supported by the House of Commons, and since the royal assent is never refused to any measure duly presented, the bulk of legislative power in Great Britain now belongs to the House of Commons.

The bills introduced into Parliament are generally called government bills and private members' bills. The former are sure of consideration; the latter are crowded into specified hours, and few of them are ever examined by the legislature. Both of these classes of bills, named from the sources whence they emanate, may be subdivided into public bills and private bills, named according to their nature and application. Public bills alter the general law of the land; private bills grant a franchise or affect a special individual or group. Parliament also passes votes or resolutions sanctioning certain of the rules, orders and regulations made by the administrative authorities.

All bills, when formally introduced, are read once, printed and distributed. The second reading is the occasion for the discussion of the bill on the floor of the house. The bill is next sent to a committee, which may amend it considerably. After the committee has reported, there comes the third reading, at which the amended bill, which may be still further amended in the course of the discussion, is finally passed or rejected. It

may, indeed, be rejected at earlier readings, but this is unlikely if it is a government bill. A bill which has been passed at third reading is sent to the other house, where it goes through a similar routine. As things now stand, most bills of any importance originate in the House of Commons.

CONTROL OF FINANCES. Financial control by the English Parliament, as was explained above, has been limited since 1911 to the House of Commons. This power of the Commons, which is theoretically almost absolute, implies a certain degree of control over the administration, even though the estimates are made by the Cabinet, and any serious change in them by the Commons would cause the resignation of the government.

When the Cabinet presents its estimates, the Commons must examine them and pass them in separate votes, to the number of some 250. It is in the examination of the estimates that the Commons are assumed to exercise a real control over administration. Since, however, the functions of the government are so vast, and its work is so complex, it is impossible for the ordinary member to know very much about what is going on. This, of course, is true in respect to any legislative body, whether it be a city council, a State legislature, a national legislature, or even a mere board of directors of a private corporation. On the other hand, there are nearly always a few members who understand the details of some phase of the work of the administration and are consequently able to make criticisms or suggestions. Their contributions to the discussion may be of considerable value in assisting to overthrow a Cabinet, but if the government is supported by a strong majority, no comment is likely to be especially significant. Practically, therefore, the Commons must necessarily be concerned less with the details of administration than with great questions of public policy which involve the expenditure of money: for example, old age pensions, the nationalization of mines, workmen's compensation, naval and military programs, and so on. By and large, the party system prevents financial control from being so effective in practice as in theory; yet the public discus-

sion of estimates doubtless keeps those responsible for the budget on their guard to avoid any action which might enable the opposition to make an attack.

The second task of the House of Commons is to provide ways and means of raising money to cover the grants which it has made. Since this involves finding new sources of revenue, increasing certain taxes, and perhaps reducing or abolishing others which are unproductive or are considered inadvisable, the questions involved are again problems of policy rather than details of administration. This is true even though at times the Commons must pay a good deal of attention to the administrative machinery which is to be used.

Contrary to the procedure in the United States, where the committees which have to do with appropriations and those which have to do with revenues are only small groups selected from the legislative body, in England these committees are the whole House of Commons. When the House of Commons is reviewing the estimates and deciding how much it will allow the government to expend, it becomes the Committee on Supply. When it is considering where the money is to come from, it is the Committee of Ways and Means. The budget is passed in two parts, namely, a Finance Act, agreed upon by the Committee of Ways and Means, and an Appropriation Act, agreed upon by the Committee on Supply.

The accounts for each year's budget are examined and audited. A report concerning them is made to the House of Commons by the Comptroller and Auditor-General. This report is examined by the Committee on Accounts of the House of Commons. Like all such reports, it is always so late as to be of little value as a direct means of control; but it assures the Commons that all revenues voted by that body have been honestly applied to their designated objects.

CONTROL OVER THE CABINET. In English doctrine, the Cabinet is subject to the legislature, especially the House of Commons. Theoretically, the King appoints the Prime Minister, and the Prime Minister chooses the members of the Cabinet. Practically, the King has little choice in the matter, as he

must select a statesman for Premier who is able to form a government which will be retained in office by a majority of the House of Commons, and this nearly always—not quite always—means that he must select the recognized leader of the strongest party. But the House of Commons, “having got the Prime Minister that it desires, finds itself constrained to accept as Ministers such colleagues as are selected by the Prime Minister, who forms his own judgment of the acceptability of the Cabinet as a whole. The House of Commons cannot exercise any choice in the selection of Ministers, still less assign particular men to particular offices.”⁴ The net result of this situation is that the House of Commons has to all intents and purposes little direct control over the choice of the Prime Minister and the ministers.

The Cabinet, once in office, has complete control of the time and the business of the House of Commons. Further, the Prime Minister not only selects Cabinet members and assigns them to their positions, but he also can dismiss them or transfer them from one office to another. So long as the party of the Prime Minister commands the majority of the House of Commons, the Prime Minister “wields all the powers of Parliament as well as all the powers of the Crown. . . . The whole strength of the Prime Minister thus rests upon the fact that he is a party Chief, the recognized Leader of a party which has obtained a majority, or at least a larger number of seats than the other parties, in the House of Commons—whether it has the support of a majority in the nation or not.”⁵

Due to this organization, instead of Parliament’s controlling the Cabinet, to a very large extent the Cabinet controls Parliament. Of course, it is possible for Parliament to defeat a Cabinet and put in a new Cabinet, but even then it is still following rather than guiding. This statement of fact is not to be understood as a plea for a different system. A body of more than six hundred persons without organization or leadership could do nothing. Parliament does well to follow leaders.

⁴ Sidney Webb and Beatrice Webb, *A Constitution for the Socialist Commonwealth of Great Britain* (London, 1920), pp. 64-71.

⁵ Ramsay Muir, *How Britain is Governed* (New York, 1930), p. 83.

when it is assured that these are persons of integrity, ability, devotion to the interests of the country, and sympathy with the will of the people in so far as this will can be known. It can always repudiate them if for any reason it chooses to do so, and in this fact lies its effective power of control.

Little direct control is exercised by Parliament over the organization of the administrative services. That function is carried on by the Prime Minister and the Cabinet in theory, but in practice almost entirely by the departments themselves, which formulate proposals and secure Cabinet assent to them.

Parliament has no such control over executive action as is possessed by the Senate of the United States. It does not ratify appointments to office. All the important positions are filled by the Cabinet.

Before the Cabinet system was thoroughly entrenched, impeachment was the only way by which ministers could be made really answerable to Parliament. The development of the principle that a Cabinet, if assured that Parliament had withdrawn its confidence, must resign, has practically eliminated the necessity, but not the possibility, of impeachment proceedings.

The Functions of the French Parliament

LEGISLATIVE PROCEDURE. The French Constitution contains very few provisions affecting the functions of Parliament as a law-making organ. Most of the legislative procedure is determined by regulations of the Chambers and by parliamentary usage.⁶ The Constitution does, however, provide⁷ that the President of the Republic shall have the initiative of laws, concurrently with the members of the two Chambers. He shall also promulgate the laws when they have been voted by the two Chambers, and he shall look after and secure their execution.

The acts by which the President of the Republic exercises the right of initiative, are called in practice "projects of law." These are really government bills, contained in a presidential

⁶ Upon the details of the legislative procedure see E. Pierre, *Traité de droit politique, électoral et parlementaire* (Paris, 1919), 5th ed., 2 vols.; R. Bonnard, *Les règlements des assemblées législatives de la France depuis 1789* (Paris, 1926).

⁷ Constitutional Law of February 25, 1875, Art. 3.

decree, countersigned by one or several ministers and deposited by a minister before either of the two Chambers. An act of this kind is considered a presidential act, rather than an act of the minister depositing it; therefore, it still retains its force even after the minister who has deposited it may have gone out of office. Such a project of law may be retired only by a new presidential decree, deposited with the Chamber which is dealing with the project. No individual minister, upon his own authority and without the signature of the President, may introduce a project of law. A minister might use the right of parliamentary initiative in his own personal name, only if he were a member of one or the other of the Chambers. Even this, however, is contrary to French parliamentary usage.⁸

The regulations of each Chamber determine in what form the initiative of private members shall be exercised. The measures initiated by the private members are called "propositions of law," as distinguished from the official "projects of law" signed by the President. The propositions of law must conform to the following regulations: they must be written, formulated into articles, and preceded by an exposition of the reasons for introducing them. It is thus possible to throw out unconsidered proposals which may be introduced during the course of a discussion, and those which are vague and indefinite in nature. The formulation of the proposition of law into articles helps to keep the content precise and clear.

Propositions of law, like official projects, are sent to the appropriate committees, which may or may not recommend them for consideration. In exceptional cases a Chamber may vote to discuss a proposition which it declares to be "urgent" without committee action, but this right is seldom used.

Members of the legislative bodies may propose amendments to any bill. An amendment is normally sent to the committee charged with the examination of the project or the proposition to which it applies. If proposed in the course of debate, the committee may demand that the amendment be sent to it.⁹ As

⁸ A. Esmein, *Éléments de droit constitutionnel français et comparé* (Paris, 1921), 7th ed., Vol. II, p. 400.

⁹ See the new Article 86 of the Regulations of the Chamber of Deputies, amended May 27, 1920.

in the United States, there is much difficulty in regard to the free amendment process, since it leads to lack of clearness, lack of harmony and logic in legislative texts, and often completely defeats the original purpose of the measure.¹⁰

Regulations of the Chambers themselves, rather than constitutional laws, determine the form of deliberations and the method of voting upon bills. Two fundamental principles are established:

1. All projects of law or propositions of law are sent before a committee, which studies them, makes such amendments as it considers necessary, and reports them back to the Assembly through one of its members.

2. The projects or propositions of law, after having been definitely taken up by the legislative body, must be submitted to one or more deliberations or readings, each of which ends with a vote. As in England and the United States, the traditional number of readings up to 1875 was three. The rules of the two Chambers later reduced the readings to two, separated by a five-day interval. The practice of doing away with the second reading by voting to declare a bill "urgent" was so common as almost to defeat the purpose of the rule demanding two readings. The Chamber of Deputies has therefore reduced the required number of readings to one, with the possibility of a second. According to the new rule of the Chamber of Deputies: "The projects and propositions of law are, in principle, submitted to a single deliberation. Nevertheless, before the vote upon the entire project or proposition, the Chamber may decide, upon the request of a member, that it will proceed to a second deliberation. In these cases, the texts voted in the first reading are sent to the committee, which may present a new report."¹¹ In the Senate the system of declaring a measure urgent has remained in force.

At an earlier period the Council of State had a very large part in the formulation of laws, since bills or proposed amend-

¹⁰ Upon these difficulties in France, see E. Villey, *Les vices de la constitution française* (Paris, 1919), pp. 113ff.

¹¹ Art. 82 of February 4, 1915.

ments must be examined and criticized by it. Although this rule is not now in effect, the government may always submit to the Council of State for advice, any project which it has prepared. Each Chamber may also send a bill to the Council of State for its advice.

In order to expedite the making of laws, particularly during war times, the Chamber of Deputies, by a modification of its rules in 1917, instituted two very rapid procedures known as the "procedure of extreme urgency" and "the immediate discussion."¹² These procedures were meant as war measures, but their use was revived in 1926 for the consideration of financial plans. They limit debate almost entirely to the government, the reporter of the committee, a speaker for the minority of the committee, and the author of an amendment; and the time of these speakers is very much restricted. A second deliberation may not take place except upon the motion of the government or the committee. The Chamber is consulted as to whether or not the proclamation of a measure passed by this procedure is to be declared urgent.

CONTROL OF FINANCES. As in other parliamentary countries, the legislature in France has the duty of passing upon the financial estimates prepared by the Cabinet. For several years past, these estimates, with supporting and explanatory statements, tables and accounts, have filled five large volumes. The Minister of Finance presents to the Chamber of Deputies the budget bill, together with the other materials relating to it. The bill is examined by the Committee on Finance, which prepares an elaborate report. A very important difference between the practice of France and that of England is the fact that in the former country the committee habitually introduces amendments so extensive that often they fairly transform the bill. Although it is obviously unfair to expect a Cabinet to administer measures of which it does not approve, with the same interest or the same success as if it were dealing with measures which it had originated, important amendments in

¹² See *Journal officiel* of January 18, 1917, p. 66, *Chambre des députés, Débats parlementaires*.

the budget bill do not lead in France, as they certainly would in England, to the resignation of the Cabinet. This is due to the fact that the Chamber of Deputies is always composed of members from numerous parties, so distributed that every Cabinet is a temporary coalition, and so disposed to assert their factional views that no financial measure, composed by any possible combination of party leaders, could escape amendment. The resignation of a Cabinet because its plans were altered would therefore be a meaningless and ineffective gesture.

The budget bill, as finally reported by the committee, is discussed first as a whole, and then article by article. The appropriations are finally voted by chapters; then a summary vote is taken for each ministry; and then special or annexed appropriations are voted. This is a lengthy process, so long, in fact, that it happens repeatedly that the budget bill is not passed by the end of the fiscal year. After the appropriations are made, the revenues are voted.

The Senate is generally unable to give to the finance bill even a fraction of the time consumed by its consideration in the Chamber of Deputies. Its work is much more cursory, and any amendments which it may introduce are, by and large, relatively unimportant. The budget bill, when both Chambers have passed it in the same form, becomes law.

The accounts for each fiscal year are audited and examined by the Chambers. If they are satisfactory, a vote is taken to release the ministry from further responsibility in regard to them. Since there have probably been several changes of ministry in the time between the passage of a budget bill and the final vote on the accounts concerning it, this method of control is not very effective, although it is logically necessary.

CONTROL OVER THE CABINET. In all parliamentary governments there is a constant control over the ministers by the legislature. In France this control is exercised by three chief methods: questions, interpellations, and parliamentary investigations. Both Chambers have equal power (in theory) as regards the use of these methods. Since the rules and the practice in France have made these types of control very specific

and definite, they furnish exceptionally good examples for study.

The rules of both Chambers provide for questions, and also stipulate that before a question can be put to a minister it is necessary that he accept it. The rule of the Chamber of Deputies reads: "Oral questions may be addressed to a minister after he has previously accepted them." This means that a minister does not have to answer a question unless he wishes, that is, he can take the risk of not answering it. In case, however, a minister refuses to respond, the method of interpellation may be resorted to. When the minister answers no general debate may follow.¹³ Among all the members of the Assembly, only the person who has raised the question may speak in regard to it, and he may speak only two times. No vote follows the explanation of the minister. The question may become an effective method of control, for the reason that it is a club always hanging over the head of the Cabinet.

In respect to the budget, questions are somewhat different. Here they may be addressed to the appropriate ministers, regarding each chapter of the budget, and these questions may lead to a real discussion. The former practice, by which questions relating to the budget might lead to an interpellation, was done away with by new regulations providing that "No interpellation may be added to the discussion of the budget."

In 1909 a system of written questions was introduced. When a question is addressed to the minister in writing, the written response of the minister is inserted in the Official Journal. According to the regulations of the Chamber of Deputies: "Any deputy may give to a minister written or oral questions. The written questions, summarily drawn up, are submitted to the president of the Chamber. Within the eight days which follow their submission, they must be printed, together with the response made by the minister. . . . The ministers have the right to declare in writing that the public interest forbids them to respond, or, that for exceptional reasons, they demand a delay in order to gather together the materials for their reply." The Senate adopted similar resolutions in 1911.

¹³ Duguít, *Traité de droit constitutionnel* (Paris, 1924), Vol. IV, p. 379.

The interpellation is the chief procedure for enforcing political responsibility. It is "a demand made by one or several members to open a debate upon the general policy of the ministry or upon an act of a specific minister." It results in a general debate in which all members may take part. "The interpellation, once introduced, becomes in a way impersonal, and the rules of the two Chambers admit that, if it is abandoned by its author, it may be taken up by any member of the assembly. It is also recognized that, upon a simple question, the demand may be produced to transform it into an interpellation; but if there is any opposition, the authorization of the assembly is necessary, and this may be refused."¹⁴

After the debate upon the interpellation, a vote upon the order of the day is taken. This expression means that the Chamber uses the motion to proceed with its regular business as an opportunity to express its opinion of the ministerial policy which has just been discussed. Thus, various party representatives may introduce such motions as: "The Chamber, censuring the Ministry for its agricultural policy, proceeds to the order of the day;" or, "The Chamber, expressing its approval of the agricultural policy of the Ministry, proceeds to the order of the day." Such expressions are known as "motivated" orders of the day. By contrast, "the order of the day pure and simple" is a mere vote to proceed, without any definite expression of opinion. Ministries often fall or stand as the result of these votes. In fact, when a ministry has definitely asked for a vote of confidence, even the order of the day pure and simple may lead to its downfall, since no expression of confidence is attached thereto.

The demand for the interpellation must be formulated in writing, must state briefly its object, and must be sent to the President of the Chamber. Without any debate, the Chamber fixes the date for the discussion. The date may be arbitrarily set when the proposed interpellation concerns foreign policy, but must be set within a period of one month when internal policies are concerned. Sometimes the minister demands an immediate discussion, in which case the Chamber always orders

¹⁴ Esmein, *op. cit.*, p. 445.

it. The rule that the interpellation upon internal politics may not be postponed for more than a month is often evaded. When the government wishes to prolong the discussion or to postpone the final vote, it requests the Chamber to place the interpellation at the foot of the order of business. This may delay action upon the interpellation, until a critical situation has changed.

Like most other legislative bodies, each Chamber in France has the right to appoint a commission composed of its own members, to investigate acts of the government or the functioning of any particular public service. Such commissions are sometimes organized to look into political, economic, or financial questions. The right of investigation is frequently exercised. The Chambers may, however, give the powers of a commission of investigation to an already existing committee. The inquiry may be ordered by a simple resolution. In no case may an investigating commission itself perform any act which belongs normally or legally within the competence of either the administration or the courts. "The Chamber supervises the functioning of all the public services, under the sanction of the ministerial responsibility: but it may not either itself or by its commissions do acts belonging to the competence of the officers attached to these services."¹⁵

Commissions of investigation have the right to demand from the government and even from the courts all documents that appear necessary. All the administrative and judicial officers must comply with requests to appear before them. By some hiatus in the law, the commissions have no means of direct coercion, and the provisions of the criminal code against those who refuse to obey summonses are not applicable. The public officer who refuses to appear before a commission of inquiry, however, commits a disciplinary fault, which may be punished in conformity with the laws and regulations of the civil service.

Private individuals, on the contrary, are not required to appear and testify before a parliamentary investigation commission. To cite private persons to appear is considered a

¹⁵ Duguit, *op. cit.*, p. 394.

judicial act, outside the powers of a commission of the legislature. Nor may a commission of investigation make any person swear to the testimony which he gives, since the taking of an oath is an act which may only be performed before a magistrate of the jurisdictions determined by law.

JUDICIAL FUNCTIONS. France, like the United States, gives to its Senate judicial as well as legislative functions. The Senate may sit as a high court of justice. As such it is competent: (1) To judge the President of the Republic when charged with high treason, upon the accusation of the Chamber of Deputies. (2) To judge the ministers for crimes connected with the exercise of their functions, likewise upon the accusation of the Chamber of Deputies. (3) To judge any person who is referred to it by the President of the Republic, for attacking the security of the state.

As in the United States, there is much criticism of this system. The claim is often made that the Senate is never actually a judicial body, but a partial political body. As in the United States, however, impeachments and trials before the Senate are very rare.

CONSTITUENT FUNCTIONS. In France the legislative authority alone changes the Constitution. The National Assembly, to which this task is given, is composed of the members of the two Chambers. For the purpose of amending the Constitution, however, they form a distinct body. As Esmein says: "The two Chambers lose momentarily their individuality, or rather the senators and the deputies take momentarily a new and complementary quality, that of members of the National Assembly."¹⁶ The reasons assigned for their meeting together are that this arrangement makes for more speed, and also promotes a greater degree of public tranquility and security by this very fact.

ELECTION OF THE PRESIDENT BY THE NATIONAL ASSEMBLY. The members of the French Parliament have one function that does not belong to the members or to either House

¹⁶ Esmein, *op. cit.*

of our own Congress, that is, the election of the national President. The President is elected by the National Assembly, by an absolute majority of the votes cast. There is no discussion, debate, or even nomination of candidates, when the Assembly meets to elect a President of the Republic. The ballots are cast with great ceremony, until some one person receives a majority.

CHAPTER XIV

THE ORGANIZATION OF THE LEGISLATURE

The organization and the procedure of legislative bodies furnish many interesting points of comparison. In all of the three countries to which special attention is given in the preceding chapters, that is, France, England, and the United States, the legislature is bicameral.

The United States

In the United States, both Houses of Congress are now required to assemble at least once every year, at noon on the third day of January, unless they fix a different day by law. This provision is embodied in an amendment to the federal Constitution,¹ recently passed in order to correct the very unsatisfactory arrangements originally made, which worked out in such a way that members of the House of Representatives did not enter upon their functions for more than a year after their election. Congress is not obliged to remain in session for any stated time, but as a matter of fact the amount of business before it is so great and the need of special sessions is so frequent that it is usually in session a great part of the year.

The organization of each House of Congress is effected under its own rules. By oral vote, the House of Representatives² elects its presiding officer, who is called the Speaker. This officer, although he must allow debate, is not expected to be an absolutely impartial moderator. He is known to be a leader of his party, and is chosen on this basis. Within very elastic limits of decency, it is understood that he will give to his own party advantageous opportunities for discussing questions and presenting motions.

¹ Twentieth Amendment, proclaimed October 15, 1933.

² The rules of the House are found printed in full in the *Journal of the House of Representatives*, 68th Cong., 1st Sess., pp. 725-732.

In addition to the Speaker, the House elects a clerk, a sergeant-at-arms, a postmaster, a doorkeeper and a chaplain. Each of these appoints all the subordinates used in connection with his office. Of all these officers, the Speaker alone is a member of the House.

As soon as the officers of the House have been elected, the rules for the session are adopted. A member (usually an important man in the majority party, to whom this pleasant and far from arduous task has been given by previous agreement) moves the adoption of the rules used at the last preceding session. Perhaps some amendments are moved; but amendments are seldom carried, since the rules already satisfy most of the "old-timers" who, like lawyers, enjoy technicalities which they know and can manipulate to their own advantage.

ORGANIZATION AND PROCEDURE IN THE HOUSE OF REPRESENTATIVES. Although all legislatures must and do appoint various committees, since only by some subdivision of functions can even a fraction of the necessary work of each session be accomplished, there is probably no parliamentary body in the world so dominated by the committee system as is the House of Representatives of the United States. This is due to several reasons. No Cabinet plans and largely directs the course of legislation. Much of the work that would be carried out in other countries by the Cabinet must be done in the United States by the various committees. Moreover, the very size of the House makes it impossible for any member to obtain a comprehensive view of the whole situation, to make investigations, to plan and manipulate, or even to discuss all matters that arise. Each member can do his part best if he specializes, that is, studies certain questions and reports the results of his study. Unfortunately, political pressures prevent the formation of committees along lines of special knowledge, experience, education, ability and interest, thus defeating one of the main objects of the system.

The committees are: standing committees, select committees, and conference committees. For various reasons—among which may be mentioned the vast quantity of legislative busi-

ness, the increasingly technical nature of that business, the fact that members of committees have certain advantages in the way of stenographic assistance and the like, the sense of self-importance which goes with membership in almost anything, and the real power connected with certain committees—the actual number of committees is now quite large.³ Their size is extremely varied. Thus, the Committee on Appropriations has thirty-five members; the Committee on Pensions, twenty-one; and the Committee on Disposition of Useless Executive Papers, two.

About a dozen of the House committees, which as a matter of fact correspond quite closely in title and work to committees in other legislative bodies, are of great importance. These are the Committees on Appropriations, Ways and Means, the Judiciary, Interstate and Foreign Commerce, Banking and Currency, Rivers and Harbors, Post Offices and Post Roads, Agriculture, Military Affairs, Naval Affairs, and Rules.⁴

All standing committees have both Republican and Democratic members, the number of whom depends on the strength of the respective parties. The party leaders reach an agreement as to the number to be given each party in every committee, and then the party caucuses fix the actual personnel. Members of third parties and "independents" are generally added to large or unimportant committees. When the lists are presented to the House, it ratifies them, under the form of "electing" its committees.

³ There are forty-four standing committees of the House listed in the Congressional Directory for December, 1932, as follows: Accounts; Agriculture; Appropriations; Banking and Currency; Census; Civil Service; Claims; Coinage, Weights, and Measures; Disposition of Useless Executive Papers; District of Columbia; Education; Election of President, Vice President, and Representatives in Congress (Elections No. 1; Elections No. 2; Elections No. 3); Enrolled Bills; Expenditures in the Executive Departments; Flood Control; Foreign Affairs; Immigration and Naturalization; Indian Affairs; Insular Affairs; Interstate and Foreign Commerce; Invalid Pensions; Irrigation and Reclamation; Judiciary; Labor; Library; Memorials; Merchant Marine, Radio, and Fisheries; Military Affairs; Mines and Mining; Naval Affairs; Patents; Pensions; Post Offices and Post Roads; Printing; Public Buildings and Grounds; Public Lands; Revision of the Laws; Rivers and Harbors; Roads; Rules; Territories; War Claims; Ways and Means; World War Veterans' Legislation.

⁴ For a discussion of the work of the rules committee, see F. A. Ogg and P. O. Ray, *Introduction to American Government* (N.Y., 1935), 5th ed., p. 371.

One of the most objectionable features of the committee system in the House of Representatives is the rigid seniority rule, according to which new members are placed at the foot of the committee lists, by both Republicans and Democrats. This makes it impossible for new men, no matter how brilliant and forceful they may be, to acquire a position of leadership in their committees; and, on the other hand, it places a premium on mere length of service and party regularity. Thus it may often happen that a member from a "sure" district, which returns the same man again and again, even though he may be poorly qualified, may be at the head of one of the most important committees.

The select committees are appointed from time to time for the study of any important questions on which the House desires information. The conference committees are appointed, as occasion arises, when the House and the Senate are unable to agree upon the details of a measure which both Houses are willing to pass in principle, but in somewhat different form, or with different amendments. Under such circumstances it is the function of a conference committee of the House to cooperate with a similar committee of the Senate, in the endeavor to resolve all differences and to embody the measure in a form which will ensure its adoption by both Houses.

A word should be said about a committee which, though not appointed or controlled by the House, yet plays an important part in its work. This is the so-called "steering committee." The place of the "party whips" and the Cabinet members as directors of debate and general procedure in the British House of Commons, is taken in the House of Representatives by the "steering committee" of the majority group and by the floor leaders of the two major parties. These are selected by party caucuses, to do exactly the work implied by their titles. The great difference between these agencies and the Cabinet members is that the latter belong to a group of men who are definitely selected for the purpose of organizing and controlling the legislative business, and who are responsible to the entire legislative body for their policies; whereas the steering committee consists of a few persons who have manipulated themselves

into dominating positions in the majority party, and who make and execute their plans without any general responsibility, since they are in no sense under the control of the House. Why has this situation arisen? Undoubtedly it is due to the fact that the Constitution, the laws, the House rules, and custom, have all failed to provide the responsible official leadership necessary in a vast unwieldy body. This in turn is closely related to the lack of a proper working coordination between the executive and the legislative branches of government.

ORGANIZATION AND PROCEDURE IN THE SENATE. The organization of the Senate of the United States differs considerably from that of the House of Representatives. The Senate cannot elect its own speaker or chairman, since the federal Constitution makes the Vice President of the United States the president of the Senate. It is not always a certainty that the president of the Senate will be a member of the party which has a majority in that House. Traditionally, this presiding officer does not use his powers for partisan purposes, at least to any important extent. Other officers correspond closely to those of the House of Representatives.

The work of committees in the Senate, and the system by which committees are appointed, closely resemble the same institutions in the House. Since the Senate is a much smaller body than the House, however, the personality of each member may count for more, and the power of the committees may be correspondingly less, than in the more numerous branch of the legislature. By the same token, fewer bills are introduced into the Senate because there are fewer members to introduce them; likewise, because of the vast numbers introduced into the House of Representatives, only a small fraction are ever passed and forwarded to the Senate. This may, and often does, mean that bills can be studied more carefully by Senate committees than by House committees; but it is offset to some extent by the fact that each Senator, as a rule, serves on a greater number of committees than does each individual Representative.

The size of Senate committees is not so much smaller than that of House committees as might be expected. This means

that each Senator may expect to be a member of several different committees.⁵ As random examples of the size of Senate committees, it may be observed that in 1932 the Committee on Interstate Commerce had nineteen members and the Committee on Printing had seven. In both Houses the ordinary number ranges between eighteen and twenty-five.

England

THE SPEAKER. As in the House of Representatives, so in the House of Commons, the most conspicuous figure is the Speaker. Beside this officer, there are the clerk and his two assistants, the sergeant-at-arms and his deputies, the chairman and deputy chairman of committees, and a chaplain. The clerk and the sergeant-at-arms and their assistants are appointed for life by the King, upon the nomination of the Prime Minister. The chairman and deputy chairman of committees, and the Speaker, are elected by the House itself for the duration of Parliament. Since the Speaker is not a political officer, but is expected to enforce the rules of procedure with absolute impartiality, and in fact practically never fails to do so, he is often reelected time after time, no matter which party is in power.⁶ When the Speakership is vacant, the Prime Minister usually suggests a person who will be satisfactory. Once in the official seat, the Speaker of the House of Commons never leaves it, as presiding officers in other bodies have sometimes done, in order to take part in debate. He votes only to decide a tie.

Perhaps the crowning expression of the general confidence in the impartial attitude maintained by the Speaker, is the

⁵ The standing committees of the Senate, as listed in the Congressional Directory for December, 1932, are as follows: Agriculture and Forestry; Appropriations; Audit and Control of the Contingent Expenses of the Senate; Banking and Currency; Civil Service; Claims; Commerce; District of Columbia; Education and Labor; Enrolled Bills; Expenditures in the Executive Departments; Finance; Foreign Relations; Immigration; Indian Affairs; Inter-oceanic Canals; Interstate Commerce; Irrigation and Reclamation; Judiciary; Library; Manufactures; Military Affairs; Mines and Mining; Naval Affairs; Patents; Pensions; Post Offices and Post Roads; Printing; Privileges and Elections; Public Buildings and Grounds; Public Lands and Surveys; Rules; Territories and Insular Affairs.

⁶ See Michael MacDonagh, *Pageant of Parliament* (New York, 1921), Vol. I, pp. 126-127.

provision of the Parliament Act of 1911, that the Speaker of the House of Commons shall certify which bills are money bills. Even though he will unquestionably be guided in his use of this power by the sentiment of the House, the fact that it is placed in his hands is a compliment not to be minimized.

Incidentally, the impartiality required of the Speaker is expected to color even his daily life outside the House. That is, beside scrupulously avoiding all participation in public debate, he never even makes a speech or enters into a public discussion upon party issues, and never attends party meetings. When he retires he is generally made a viscount, and is given a liberal pension.

COMMITTEES OF THE HOUSE OF COMMONS. Like all legislative bodies, the House of Commons operates to a great extent through committees. The committee system grew up under Queen Elizabeth and her successors. Quite often small committees were appointed to consider the details of bills and other questions. For very important matters larger committees were appointed, and there was a tendency to include any and all members of the House who were willing to attend. This led to the system of Grand Committees and Committees of the Whole House.⁷ Before 1906, when parliamentary procedure in the House of Commons was altered, a bill went automatically to the Committee of the Whole House. Now it goes automatically to a standing committee, unless it is a financial measure, a consolidated fund bill, an appropriation bill, or a bill confirming provisional orders, all of which are considered by the Committee of the Whole House. By special vote, any bill may be taken up in the same way.

The Committee of the Whole House consists of the entire membership of the House; but the presiding officer is the chairman of committees, who sits in the clerk's chair rather than in the Speaker's chair. Procedure is different from that used in the regular course of debate. For example, a member may speak any number of times on the same question, and the previ-

⁷ J. J. Clarke, *Outlines of Central Government* (New York and London, 1923), 2d ed., p. 27.

ous question may not be moved. This tends toward making procedure much less formal and makes it possible to handle business with relative speed.

Select committees usually consist of fifteen members, but they may be smaller if occasion arises. Their chief function is to collect evidence and to summon and examine witnesses. They may not compel the attendance of witnesses or require papers to be produced unless the House expressly gives them this power. Select committees are generally asked to study bills and questions of great importance, especially if they involve serious changes or new departures. Every select committee keeps detailed records of its proceedings, which are printed with the formal report in the parliamentary papers. Some of the most valuable information regarding governmental institutions in England is to be found in the reports of such committees. As a rule eight or ten of these committees are selected for each session. Some of them are always formed, and really should be thought of as standing committees. Among these are the Committee on Selection, the Committee on Standing Orders, and the Committee on Public Petitions.

Since about 1882 it has been customary, in the House of Commons, to appoint standing committees to assist the House in its labors.⁸ There are five of these standing committees, one of which deals entirely with bills relating exclusively to Scotland. The others are simply designated as committees A, B, C, and D. The Speaker assigns to them bills or other business, normally on the advice of the Committee on Selection. These committees examine the bills referred to them, usually after the second reading. When they have made the necessary amendments they report the bills to the House for third reading. A standing committee in addition to the foregoing is the Committee of Public Accounts.⁹

Occasionally what are known as hybrid committees are selected, consisting of an equal number of members selected from the government and the opposition. Joint committees of

⁸ Standing Order No. 47. See also Standing Order Nos. 105ff.

⁹ Standing Order No. 75.

both Houses of Parliament are sometimes asked to consider private bills.

There are important differences between the committee system in England and the system in the United States. In the British Parliament the Cabinet itself does much of the work which in the United States must be done by committees. Because of its very close relationship with the government departments, the Cabinet is able to secure all necessary aid in framing bills, or in securing information from the departments. For this same reason, relatively few committees are required. The committees in England are much larger than in the United States; a fact which is probably a disadvantage. No rigid rules bind the committees of the House of Commons in respect to seniority in service, so that it is possible for a man of ability to become one of the dominating personalities in a committee, almost as soon as he enters the House.

France

ORGANIZATION OF THE LEGISLATURE IN FRANCE. The authors of the Constitution of 1875 believed that if Parliament were to create the legislature as a permanent body, that is, give it the right to fix the date and the duration of its own sessions, which had been given to the old national constituent assemblies, this might give Parliament a dangerous preponderance of public power. On the other hand, if they gave to the President of the Republic unlimited powers to convoke, adjourn and prorogue Parliament, such a prerogative would hardly be acceptable in a democratic country. In the endeavor to balance these forces they established a rather complicated system according to which certain rights belong to Parliament and certain rights to the government.¹⁰

The Constitution accordingly provides that "The two Chambers must meet in session five months at least each year." And, "The Senate and the Chamber of Deputies shall assemble each year on the second Tuesday in January, unless convened earlier by the President of the Republic." Also, "The Presi-

¹⁰ L. Duguit, *Traité de droit constitutionnel* (Paris, 1924), Vol. IV, p. 236.

dent of the Republic pronounces the closing of the session. He may convene the Chambers in extraordinary session. He shall convene them if, during the recess, an absolute majority of the members of each Chamber request it. The President may adjourn the Chambers. The adjournment, however, shall not exceed one month, nor take place more than twice in the same session."

It is always necessary that the two Chambers shall meet at the same time, since the constitutional law provides that every meeting of either of the two Chambers which shall be held at a time when the other is not in session is illegal and void, except under special conditions, such as trials by the Senate.

The sittings of the Senate and the Chamber of Deputies are public, but upon the request of a fixed number of members, as determined by the rules, they may be made secret. Each Chamber meets for the first day of the ordinary session, under the presidency of the oldest of its members, assisted by the six youngest members as secretaries.¹¹ The first business to be performed is normally the election of the "bureau," or list of officers. The law provides: "The bureau of each of the two Chambers shall be elected each year for the duration of the entire session and of every extraordinary session which may be held before the regular session of the following year."¹²

At the head of the bureau is the president of the respective Chamber. He presides over the deliberations, opens and closes the meetings, receives motions and proposals of all kinds, projects of laws, petitions, election claims, and any similar business. He applies the regulatory penalties. He is charged with looking after the security of the Chamber, and may ask for armed forces to do so.

Other members of the bureau are: four vice presidents who take the place of the president when necessary; eight secretaries, who supervise the editing of the proceedings of each meeting and read the minutes of the proceedings at the beginning of the next session; and four so-called questeurs, who are charged with the business management of the Chamber.

¹¹ Rules of the Senate, Art. 1; Rules of the Chamber, Art. 7.

¹² Law of July 16, 1875.

The bureau as a body has several powers. It appoints the employees in the service of the Chamber, and it may always be consulted by the president on any question touching his functions.

The rules and regulations of each Chamber are made by the Chamber itself, except for such matters as are especially governed by law, such as the publicity of sessions. The Senate voted its original rules, or by-laws, on June 10, 1876, and the Chamber of Deputies on June 16 of the same year. These rules have been amended several times. The Chamber of Deputies proceeded to a complete revision in 1915, and several other amendments were made in 1920. The president of each Chamber enforces its rules. In so doing he always has the right to consult the bureau of the Chamber. When there is any doubt upon the bearing or the application of the rules in certain cases listed in the regulations, such consultation is necessary.

THE FRENCH PARLIAMENTARY COMMITTEES. Until 1902 the commissions or committees of both the Chamber of Deputies and the Senate were in principle special and temporary. The special committees were selected for the study of one or several particular topics. They could occupy themselves only with the problems which were assigned to them. These committees were temporary, in that they ceased to exist as soon as the purpose for which they were selected was accomplished. This rule was first adopted in the Constitution of the Year III (article 67), with the purpose of preventing committees from trespassing upon the domain of the administration as the committees of the Constituent Assembly had done.¹³

This system was greatly criticized on the ground that the committees sometimes took no action or were very slow in action; and that the examination of all proposals by special committees meant a lack of coordination in work and a great waste of time and effort. For these reasons, late in 1902, the Chamber of Deputies adopted the practice of selecting grand permanent committees. The Senate did not at once follow this example, but at present it has permanent committees.

¹³ Duguit, *op. cit.*, pp. 328-329.

The regulations of the Chamber of Deputies provide: "At the beginning of each legislature and of each ordinary session, the Chamber of Deputies appoints 20 grand permanent commissions, without prejudice to other special or permanent commissions which it may decide to establish. These commissions are given the following titles: 1. Commission of general administration, departmental and communal; 2. commission of foreign affairs; 3. commission of agriculture; 4. commission of Algeria, the colonies and the protectorates; 5. commission of Alsace and Lorraine; 6. commission of the army; 7. commission of insurance and of provision for social service; 8. commission of commerce and of industry; 9. commission of final accounts; 10. commission of customs; 11. commission of education and the fine arts; 12. commission of finances; 13. commission of health; 14. commission of civil and criminal legislation; 15. commission of the merchant marine; 16. commission of the navy; 17. commission of mines and motive power; 18. commission of freed regions; 19. commission of labor; 20. commission of public works and means of communication."

These committees are renewed at the opening of each session, but since their members are indefinitely reeligible the same members may continue year after year. Each committee is composed of 44 members, theoretically elected by *scrutin de liste* by the Chamber in general assembly. In practice, however, the election very rarely takes place by the Chamber; for (according to Article 12 of the Regulations) different political groups which are regularly constituted may send to the president of the Chamber the list of their candidates for the grand committees, and the names of these candidates are placed upon the committee lists in proportion to the number of the persons belonging to the different parties. The few deputies not belonging to any political group are called together by the president of the Chamber to designate their candidates. These lists are then inserted in the Official Journal, and if before the fixed day 50 deputies do not oppose them, the lists are considered as having received the approval of the Chamber. In case of opposition, the Chamber proceeds to a vote. When vacancies occur,

each group designates the candidates to fill them. No deputy may be a member at the same time of more than two of these grand permanent committees.

It has been remarked that in addition to these permanent commissions, between which are divided all projects, all propositions of law, or resolutions or motions, the Chamber may establish special committees. This may be done when very important and unusual matters arise. Again, in case of conflict between several committees, the president of the Chamber submits the question to the Chamber, which decides whether the project or proposition shall be examined by these committees deliberating in common, or by a special committee.

Each of these permanent committees appoints a president, vice presidents and secretaries. Unless by a special decision of the Chamber, the committees handle all projects and propositions of law in their own particular fields. Twice a year, a report of the work of every grand permanent committee is published in the Official Journal.

In order to remedy the difficulties arising from the fact that the adjournment and integral renewal of the Chamber of Deputies might mean the wastage of valuable work done by the committees, the rules now provide: "After the integral renewal of the Chamber, the reports upon the matters handled by the committees of the preceding legislature may be opened up and sent to the new committees, either upon the initiative of the committees themselves, or upon the initiative of 20 members. . . . When the demand emanates from a committee, the sending is of right; in the contrary case, the Chamber decides by a sitting and standing vote, without debate. Any committee that has charge of a report may decide to accept its conclusions, without amendment. If the committee believes that it is necessary to amend one or more articles, it submits to the Chamber a report limited to the articles amended."¹⁴

THE COMMITTEES OF THE SENATE. At the opening of each ordinary session, the Senate appoints for the duration of a year eleven general committees, which have the following

¹⁴ Article 36.

titles: Committee of the Army; Committee of the Navy; Committee of Foreign Affairs and of the General Policy of the Colonies and the Protectorates; Committee of Customs and Commercial Agreements; Committee of Railways, Transportation and Supply; Committee of Agriculture; Committee of Education; Committee of Health Assistance and Insurance and Social Measures; Committee of Civil and Criminal Legislation; Committee of General, Departmental and Communal Administration; Committee of Commerce, Industry, Labor and Posts.

The Senate also appoints a general Committee of Finance to examine the budget. This committee is appointed after the distribution of the general statements regarding the budget for each fiscal year, and remains in existence until the next year's finance committee is selected as its successor. Two other special committees are appointed at the same time, namely, a Committee Charged with the Accounting of the Senate and a Committee Charged with the Examination of Petitions.

"In the Senate as in the Chamber, the permanent or special committees have entire freedom for the direction of their work; they may make investigations, demand explanations from the government, the administrations, or the bureaus of the ministers, or call the ministers before them to give explanations. It is in this way that they may become for the Chambers, not only an instrument for the preparation of the texts of laws, but also a precious organ for the exercise of the powers of control which constitutionally belong to the Chambers, over all of the public services. . . ." ¹⁵

Despite their powers of control, these committees may not perform acts that are judicial in character, or make decisions that have the character of executory administrative acts. In principle the work of a committee is the revision of a bill or a resolution, preparatory to the vote of the Chambers, and the preparation of a report on the questions involved by some member of the committee. The revised text of the bill or other act, and the report that goes with it, serve as the basis for discussion in the public session. The advantages and disadvantages of the committee system in France have been debated a

¹⁵ Duguit, *op. cit.*, pp. 334ff.

good deal in the course of the past few years.¹⁶ Those who believe that a parliamentary government is based upon a nice balance between the executive and the legislature, feel that this system is giving to the legislature too much control over details. It is also claimed that the chairmen of the committees become so well versed in the particular questions which they handle, that they often endeavor to dominate the Cabinet members; or perhaps they themselves seek to become Cabinet members, heading the particular Cabinet posts corresponding to their committees. By bringing undue pressure upon the Cabinet, which ought to be responsible for policy, the committee members can greatly interfere with the proper leadership of the government. This situation has been most in evidence in respect to public finance. The finance committee habitually disregards and revises the plans of the Minister of Finance, to such an extent that the actual budget bill discussed by the legislature is to all intents and purposes the creation of the committee.

The ministers are placed at another special disadvantage by the committee system used in the French Parliament. By contrast with England, where a government measure is in the charge of a minister from the time of its introduction to the time of its passage, in France the bill goes immediately before a committee which meets in secret without the guidance of the minister. Even worse, the committee is still expected to take complete charge of the bill when it is brought before the Chamber. The minister does not even officially defend the bill in the course of debate. It is the committee reporter who explains and defends it, accepts and rejects amendments. It is true that the minister may take the floor and speak at any time, and that the Premier may force his policies upon the Chamber by demanding a vote of confidence. This does not atone for the disadvantages of a division of leadership between the ministry and the committees.

¹⁶ For articles on these French parliamentary committees, see Lindsay Rogers, "Parliamentary Commissions in France," *Political Science Quarterly* (September, 1923), Vol. XXXVIII, No. 3, pp. 413-442; R. K. Gooch, "The French Parliamentary Committee System," *Economica* (June, 1928), Vol. VIII, No. 23, pp. 147-158.

Even the severest critics of the committee system as it has developed in France have no idea of doing away with it. Committees are indispensable to the despatch of legislative business today. It would be quite possible, however, and, in the opinion of many thoughtful observers, very desirable, to restrain the powers of the committees to making only such textual changes as are agreed to by the ministry, and embodying other suggestions for amendment in the report rather than the bill. Certainly the appropriate minister, rather than the reporter of a committee, should defend the bill in the course of debate.

Summary and Conclusions

It is now necessary to return to the question which was posed at the outset of this study of legislatures: Why are legislatures adversely criticized today, and what methods can be devised for improving their efficiency?

There is little doubt that the greatest cause for general dissatisfaction with the legislature is the unprecedented complexity of the social, political, and economic situation throughout the world. The average member of the legislature, like the average private individual, is unable to foresee the consequences of various proposed policies, and unable to devise a program for the future which can be expected, with any reasonable degree of certainty, to guarantee remedies for the evils of today. He, therefore, prefers to "play safe" by doing as little as possible, except along old and well-established lines. The result is that even the most democratic countries are dallying with the idea of a legally established dictatorship, which will act rather than temporize.

Those who deplore this tendency, and who desire to restore the prestige of the legislature, must occupy themselves with the question of increasing its efficiency. Several methods of doing so have been attempted with more or less success, but none can be considered wholly successful as yet.

In all the countries which have been examined, the legislature has displayed a more or less marked tendency to disburden itself of details by passing bills embodying general outlines of policy, and delegating sub-legislative powers to fill in these

outlines, to the executive authorities, the head of state, the cabinet or some member or members thereof, or to special boards, commissions, or subordinate authorities.

But here new problems of government arise. How far can the legislature delegate its functions? What is to be the relationship of the legislature to the subordinate authorities? Shall they be established under the control of the legislature, or shall they be on an independent basis, subordinate only to the control of the courts in respect to the legality of their acts? Is it advisable to give powers of sub-legislation to the executive, unless he is made subordinate to the legislature?

Should special administrative courts be established, to handle cases that arise in respect to the use of sub-legislative power? Should sub-legislative power, administrative power and judicial power be lodged in the hands of one authority such as an interstate commerce commission, a federal trade commission, and the like, or should these functions be separated? Such are a few of the problems that must be solved before the delegation of sub-legislative power can be accomplished to the general satisfaction. There is no doubt that such delegation, properly safeguarded, is a necessary and advisable procedure, and an effective means of avoiding the necessity of dictatorship. Let the legislature have the courage to decide upon its general policy, and it may fairly require the administration to provide for the details.

Another aid to the legislature in handling its complex work is to establish some sort of Economic Planning Authority, to assist in the solution of the economic problems before the legislature. Such authorities have been established in several countries. But in this connection, too, various governmental problems of the first magnitude arise. Shall such an authority be coordinate with the legislature, or shall it be subordinate to the legislature? Shall it be an agent of the Cabinet, acting in a purely advisory capacity, as in France? Shall it have the right to introduce laws, or shall it merely give its opinion in respect to laws? Shall it have a large technical staff to make elaborate examinations as to the effects of tariffs, the extent of the national resources, what is needed in the way of national

defense or public improvements, and so on, or shall it be composed of representatives of various groups and associations which merely give advice from their own particular stand-points?

The customary method of lightening the work of the legislature is by giving over general discussion and planning of legislation to the Cabinet. Members of the Cabinet, with the expert staffs under them, are largely held responsible, not only for administration, but also for formulating policies, drafting bills, and forcing them through the legislature. If the French or German legislatures wish bills on particular subjects they rarely frame these themselves, but request the Cabinet to draft the measures. The Cabinet acts then as the responsible authority both in the carrying on of administration and in the formulation of policy. When they are unable to formulate policies which are acceptable to the legislature, they must resign. In this way legislative leadership is secured.

This is one of the outstanding merits of the Cabinet form of government, and its absence is one of the manifest defects of the presidential form of government. Under the presidential form of government there is no organic relationship between the executive authority and the legislative authority. The legislative authority either has no leadership at all or is forced to develop its own leadership in each House. This leadership may be quite out of harmony with the leadership assumed by the President as nominal head of the political party. This may result in interference, deadlocks and very great slowing up of the public business. Why, then, is there an equal dissatisfaction with the legislature in countries which have Cabinet government?

To answer this question is not easy. Probably the most important point to consider is the multiplication of political parties today, which makes ideal Cabinet government—that is, government by a Cabinet supported by a clear majority of the legislature—almost a thing of the past, even in England. It may be that proportional representation must be surrendered, or perhaps so modified that the party receiving the greatest number of popular votes is given at least fifty-one percent of

the legislative seats, while the remaining seats are distributed among the other parties according to some plan of proportional representation. Although such a modification would certainly be condemned by many persons as un-democratic, it is unquestionably far more democratic than dictatorship, for it leaves the popularly elected legislature with unimpaired powers, and provides it with a working organization.

Finally, a method by which the legislature has attempted to relieve itself of certain burdens has been to arrange for technical assistance in drafting bills. Thus, the Congress of the United States has established the Legislative Reference Division in the Library of Congress, which answers questions asked by Senators and Representatives. There is also a bill-drafting committee of experts who are supposed to place bills in a clear and readable form. In France the Council of State is very often requested to draft bills; and elsewhere the Cabinet is often asked to do so.

Despite all these devices, however, the central legislative authority is still overburdened with work. As a further method of decreasing legislative burdens, it has been suggested that a part of the legislative function should be given over to local governments, much as, in the United States, a majority of legislative functions are given over to State legislative bodies. To attempt to do this, however, leads to several difficulties, such as conflicts of jurisdiction, lack of standardized ways of procedure, and lack of uniformity in local administration.

Evidently much careful thought and experimentation are still needed, in order to improve the devices already in use for lessening the volume of legislative work. Beside this, however, it is necessary to provide the legislature with informed and expert leadership, so that the possibilities of action and the probable consequences of alternative types of action may be placed before it, and its fiat may be given to the policies devised by leaders whom it can trust and will follow. These leaders should normally and logically be the Cabinet. Even in countries and in states which do not possess Cabinets, however, other sources of leadership are available. The chief danger of today in all countries is the mood of cynical despair which

refuses to believe that representative government can correct its own faults, and which would rather drift into a condition where either despotism or anarchy must result, than make the effort necessary to improve the position and prestige of the legislature.

CHAPTER XV

THE JUDICIAL SYSTEM

The vast social and economic changes which have left their marks upon the other branches of government have not failed to affect the judicial system. Legal regulation of the hours and conditions of labor, of the services and rates of public utilities, of banking, insurance and transportation, has necessitated the adjudication of innumerable cases arising under the various laws. New inventions have demanded new regulatory devices. The airplane and the radio have given rise to many questions which, in the years to come, the law and the courts together must answer.

Within the past fifty years business has been undergoing profound changes, through concentration, the establishment of holding companies, the establishment of investment trusts, and the multiplication of chain stores and branch banks. These changes have compelled the legislatures and the courts to devise new methods of keeping business under the control of law. Tariff and customs laws and tax laws have increased in number and complexity, requiring special knowledge for the adjudication of cases arising under them.

There has even been a rapid change in methods of crime. Criminals have been able to organize as never before, due to ease of communication. They have been able to equip themselves with machine guns, high-powered cars, airplanes and radios, in order to carry out their plans.

As a result of these numerous changes, all modern states have been forced to examine their judicial machinery, their judicial processes and methods. In some cases the judicial districts into which the state was formerly divided no longer seem logical. Types of judicial organization formerly considered adequate have proved not to be so, and old methods of procedure have proved inadequate for many new types of cases.

It has been necessary to make repeated improvements in the legal system within which the courts function.

Among the specific questions which various countries have considered in this connection are the following:

- Must statutory law replace common law in so far as possible?
- Should the law be codified in order that it may become more simple and so be more readily known?
- Should a distinction be made between private and public law, on the ground that the private law deals with the relationships between individuals, whereas the public law deals with the relationships of individuals to the state and of state authorities with one another?
- Should there be codes of civil and criminal procedure? How shall rules of procedure be established?
- Should there longer be a distinction between law and equity?
- Shall judicial organization be established uniformly by a central authority, or in case of a federation, shall it be established by the individual states?
- How shall the judicial system be organized?
- Shall administrative courts be established?
- What shall be the educational training, method of selection, method of removal, and tenure, of judicial personnel?
- What is the function of the bar, how shall it be organized, how shall persons be admitted to it and removed from it?
- What kind of jury system should there be?
- How shall public prosecutions be carried on?
- What shall be the procedure in civil cases? Can it be simplified and be made less expensive?
- What shall be the procedure in criminal cases?
- Should special processes and procedures be established in administrative cases, or cases involving the public law?

In no single country have all these problems been solved to the general satisfaction of jurists and the people. It is impossible to discuss them here, because of their complexity and their ramifications and modifications in various political systems; but they must at least be stated, because attempts to solve them will unquestionably bring about changes in all judicial systems.

A. Basic Legal Systems

The judicial system of the United States is based, like that of England, on the common law; whereas the French and the traditional German systems are based on Roman law.

The Common Law Systems

In all English-speaking countries much importance is attached to the common law; that is, the great body of law which has been built up gradually as the result of court decisions, but which has never been enacted in the form of statutes. This law is not codified, or even set forth in an authoritative text. One cannot go to any book and find it written down. Its content and its applications must be deduced from the study and comparison of numerous cases; there is no volume or set of volumes in which it has been expressed as a whole at any one time. Common law is traditional law. In both England and the United States, much that was formerly within the domain of common law has now been placed in the field of statutory law. In some instances the statutes have done little more than give summary expression to the common law; in other instances they have enacted quite novel provisions; frequently the same statute has ratified certain principles of the common law and altered or rejected others, introducing new conceptions of right and justice. Wherever the Anglo-American system of laws is in effect, statutes have made marked changes—to select examples almost at random—in the common law principles governing such matters as domestic relations, property rights, and the old master and servant obligations. Despite these legislative enactments, the common law or judge-made law still prevails to a great extent in such important fields as contracts, torts, wills, trusts, the law of municipal corporations, public utility law, the liability of the state and its subdivisions, the liability of public officers for wrongful acts, and the law of officers.¹ It should be noted, also, that even though changes

¹ On the subject of the common law see Oliver Wendell Holmes, *The Common Law* (Boston, 1881); Roscoe Pound, *The Spirit of the Common Law* (Boston, 1921); Sir Frederick Pollock, *The Genius of the Common Law* (New York, 1912); A. V. Dicey, *Law and Public Opinion in England* (New York and London, 1905).

have been introduced by statutes, common law principles are used in the application of these statutes.

Because of the great influence of the common law in the United States and England, the courts in these countries, when interpreting or applying any law or deciding any question, give more weight to recorded judicial opinions on the points at issue than is given to such opinions in countries where the common law is less important. This does not mean that judges anywhere are so arrogant as to disregard entirely the work of their predecessors and their colleagues. On the contrary, it is the general custom of judges to consider this work with care, and to be guided by it unless they feel bound for urgent reasons to depart from it. But in the United States and England this custom has become a guiding principle, known as the principle or doctrine of *stare decisis*—which means that the courts habitually abide by earlier decisions, and seek in such decisions for light on any case before them. The more rapidly conditions are changing, the more difficult it will be, obviously, to follow this rule; and the attempt to do so often leads to strained application of words which do not really fit the new circumstances.

The Civil Law System

In France, Germany, and Italy, the common law has much less significance. Painstaking efforts have been made to provide a written law so comprehensive that the judge can find therein the basic rules applicable to every case which may come before him, and thus to avoid the necessity of having the judge "find" the law in precedent, custom, and his own views. These efforts have been more successful in the field of private law than in that of public law. Both France and Germany possess famous codes of civil law, criminal law, and civil and criminal procedure, which are of truly remarkable scope. They also possess various statutes and codes covering special branches of public law. There is consequently no doubt that although in both countries judge-made law plays a part in the establishment and development of principles which are not yet in written form, this part is slight as compared with the importance of the common law in the English-speaking countries.

The civil and criminal codes of Germany and France cover in great detail all the more important human relationships which are capable of legal regulation. The civil codes cover the status of persons, marriage, divorce, questions of paternity, adoption, and guardianship; all property relationships; the ways in which ownership may be acquired, such as successions, gifts *inter vivos* and wills; contracts, sales, exchange, partnerships, agency, mortgages, and various other subjects. The criminal codes explain the penalties which may be imposed in criminal and correctional matters; the persons who are subject to punishment, and those who are held irresponsible or excusable for crimes and misdemeanors; the kinds of crimes and misdemeanors, and so on. In other words, the civil and criminal codes deal with practically all civil or criminal relationships in which the individual can find himself. The procedure to be followed in the hearing of cases, the rights of the parties, the possibilities of appeal, and so on, are set forth in codes of civil procedure and codes of criminal procedure. For certain very important subjects, such as commerce, labor, and the like, special codes exist. In the French and German systems, the doctrine of *stare decisis* is not recognized, but each case is decided on its merits. In France the courts are expressly forbidden to rely upon previous decisions.²

In both France and Germany the codified law is applicable throughout the whole country, whereas in the United States, each State has changed and modified the common law at its own convenience. The net result is, that instead of having one system of judge-made law for the United States, we have many systems, very much alike in certain respects but very different in others.

Important Differences Between Common Law and Civil Law Systems

Several important results flow from the differences between the system of law which is administered in France and other

² Article 5 of the French Civil Code: "Judges are forbidden, when giving judgment in the cases that are brought before them, to lay down general rules of conduct or decide a case by holding it was governed by previous decision."

continental states, and that which is administered in the United States and England. The first is, that under a code system laid down by the legislature, the courts have no such power in both private and governmental relationships as they have under the common law system; for where the law is largely judge-made, it is manifest that the judge rather than the legislature controls many situations.

The second is the relative uncertainty as to what the common law actually is. Judge-made law, based upon the doctrine of *stare decisis*, particularly in a country like the United States with so many different court systems making decisions, is a rather uncertain thing. Ways must be devised for finding out what the judge-made law is. Necessity has been the mother of invention, and in the United States law encyclopedias and digests are available and an elaborate "key" system has been established. But even with these aids, the problem of finding out what is the law on almost any one point is stupendous. Because it varies so greatly from one State to the next, in many instances all that can be said is that the predominant opinion seems to be thus and so.

The extremely wide power of the judge to construe statutes in the United States and England, coupled with the fact that construction is practically always made with the philosophy, the precedents and the principles of the common law in mind, makes it necessary to read all the leading court decisions regarding any one statute with great care, in order to find out what the law really is. Nearly every statutory law of any importance has attached to it, as it were, a multitude of decisions which expand it, interpret it, and often change its evident original meaning. If one does not know these decisions he does not know the law.

In the continental system a sharp distinction is made between private and public law. In the Anglo-American system there is no clear distinction. According to the continental system, the private law deals fundamentally with the relationships of individuals to one another. The state merely steps in to see that these individuals act toward one another in a fair and honest way. The public law, on the other hand, deals with

the relationships between individuals and the state, the mutual relationships of the public authorities and agencies, and the functioning of the public services.³ In the public law the individual is no longer in the position of one equal dealing with another, with the state acting merely as an arbiter. The state has a special interest in the question. The individual cannot meet the state on equal terms, since the latter may formulate rules and regulations, issue orders, exercise compulsion, or change the legal relationships of the individual without his consent.

From this conception is developed the distinction between public and private law. The ordinary law and methods of enforcing the law are not considered applicable when the case involves the state, acting not as an individual but as the social power. Different procedures are held to be necessary, and different factors must be taken into consideration.

The idea of making a careful separation of power between the courts and the administration enters in at this point. In France and Germany the ordinary courts are not allowed to control the public administration as they would control individuals. In fact, they may not control the administration at all, except in those cases, as in contracts and other fiscal relationships, where the state places itself upon the same footing as the individual. This reasoning leads naturally to the establishment of special courts to control the administration, called administrative courts. In other words, the ordinary courts are intended to control and regulate the dealings of individuals with one another, and the dealings of the state with the individual on an equal basis. When the state does not deal with the individual on an equality, but in the capacity of the holder and user of power, conflicts must go before special tribunals.

Let us take a concrete example. A owes B a certain sum of money upon a contract. On the other hand, A owes the state a certain amount of money for a tax. In both cases there

³ It is true that the state prosecutes many infractions of private law; it is also true that the state, or one of its agencies, may be a party in a private lawsuit, especially when it permits suits against it in contracts; yet in the field of public law the state is more than arbiter, prosecutor, or business party, it is the holder and wielder of public power, as such.

is a debt, but in the first case there has been an agreement, a meeting of minds, a mutual exchange of values, and an exercise of free will on both sides. In the second case, the state has provided for the tax without consulting A; it has special methods of collecting the debt; it may permit A to contest the tax in special ways or before a special tax court.

There are several important results of the separation of public from private law. In the first place, when the public law is collected in codes it is much easier to find out what it is, than when it is combined with all the civil and criminal law. Due to the fact that the public law in continental states is clearly codified, many special books are available regarding it and many courses of study are given in the universities in connection with the subject. The lack of clear distinction between public law and private law in the United States and England has caused the study of public law to be neglected.⁴

In the second place, the separation of public law from private law has influenced the development of special administrative courts, which deal primarily with questions of public law. The fact that the administrative court decisions in France and Germany are published separately from the ordinary decisions, makes it possible to find them easily. Again, in France and other continental countries there are supreme administrative courts, which summarize and unify the jurisprudence. Only a few highly technical matters are settled finally by special administrative courts.

By contrast, if one should try to study the administrative law in the United States, he would find it necessary to consult the statutes of forty-eight different States and the federal statutes; he would be forced to investigate the cases decided by several

⁴It is true that courses are given in constitutional law in our larger colleges and universities, and that in the larger universities courses in special phases of public law or administrative law are given, such as public utilities law, the law of officers, the law of municipal corporations. There are no courses, however, so far as the authors know, comparable to the general courses in administrative law and public law given in the universities of France and Germany. Few law schools, even, give adequate courses in public law, with the result that both our lawyers and our judges, knowing little regarding the public law, and much regarding the private law, apply the private law criteria to all public cases that come before them.

hundreds of federal and State commissions, boards, and other authorities, all of which decide administrative cases; and he would have to consult the decisions of all the various federal and State courts, including the decisions of the federal courts which have special jurisdiction over particular kinds of public law cases, such as the Court of Claims, the Court of Customs and Patent Appeals, and the Board of Tax Appeals; also the opinions of the other federal courts, and the reports of the Supreme Court of the United States. Even then, he would find that there is no clear line of separation between public and private law.

Finally, when public and private law are kept separate it is much easier to develop the proper kinds of remedies against governmental action. The development of suitable public law procedures and remedies against governmental action not only tends to protect citizens but also to hold the administration to a more strict accountability than when private law procedures and remedies are used; for, due to the expense, the delay, and the difficulty of making and presenting a case under the rules of private law, a citizen will often suffer the administration to commit a wrong rather than bring an action against it.

We have already referred to the way in which the constitutional law of France differs from that of the United States. It is evident that when the courts pass upon the constitutionality of legislative acts as they do in the United States, they have very large power over both legislation and administration. In the French system, the courts can of necessity exercise little power of control over the Constitution. In Germany, even when the Weimar Constitution was in full effect, the courts did not possess powers of judicial review comparable to those of the courts in the United States. At present, the question of constitutionality is to all intents impossible in Germany, as the "Third Reich" is not bound by the Constitution in any definite way.

The continental legal system varies from the Anglo-American system also in respect to the training of judges. In the Anglo-American system the judges are chosen from among active practitioners or attorneys. In the continental system,

one trains for the profession of judge as one trains for any other profession. The judges are chosen from among those who have been educated for the profession and who expect to make it their life work.

In the continental system the jury plays a much less important part in the settlement of cases than in the Anglo-American system. In fact, the jury system has not been generally used in civil cases in either France or Germany, nor has it played a preponderant rôle in criminal cases. No jury is used in administrative cases or in cases before the administrative courts.

The final basic distinction to be considered here between the Franco-German and the Anglo-American system refers to the manner of making an accusation. In the Anglo-American system there exists what is known as the accusatorial method. Originally this system went on the ground that a crime is primarily a private matter between the person who has been injured as the result of the crime and the person believed to be guilty. Although there has been a breaking away from this primitive conception, the Anglo-American system "contemplates that in each case there shall be a personal accuser who will come forward and charge with the crime the person to whom the circumstances point as probably guilty. The accuser is normally the one who has suffered injury or loss as the result of the crime."⁵ As a result of this system, in many instances the state refuses to initiate criminal proceedings, or to continue the prosecution if the private person who has suffered the injury or the loss neglects or refuses to take action. Often the state will not concern itself with crime that involves merely pecuniary loss. The whole procedure of a criminal case is affected by this attitude. It is true that murder and some other crimes are regarded as crimes against the state and prosecuted as such, but this is really a modification of the basic viewpoint.

In the inquisitorial system, as developed in France and other European countries, the basic principle is, that all infractions of the criminal law are offenses against the state itself, not merely against the individual who has been injured or who has sus-

⁵ W. F. Willoughby, *Principles of Judicial Administration* (Washington, D. C., 1929), p. 190.

tained the loss; and that the state is directly responsible for taking the steps necessary to apprehend persons believed to be guilty, and to prosecute them. In accordance with this principle, in France or Germany, the public prosecutor immediately takes charge when a crime is reported. Through an investigating judge, a detailed examination is made of all the circumstances of the crime and the persons connected therewith. After the preliminary investigation, the court itself determines whether or not the persons accused should be brought to trial.

B. Organization of Judicial Systems in Democratic States

The Judicial System of the United States

DISTRIBUTION OF JUDICIAL POWER. The judicial system of the United States⁶ contemplates separate and distinct systems of State courts and federal courts. The federal courts are established under federal laws; the State courts, under State laws. The jurisdiction and the powers of the federal courts are derived from the national Constitution and from the acts of Congress. The federal government has a limited judicial power, which extends only to cases in law and equity arising under the Constitution and laws of the United States, to all cases affecting ambassadors and other public ministers and consuls, to cases of admiralty and maritime jurisdiction, to controversies to which the United States is a party, to controversies between two or more States, between citizens of different States, and between citizens of the same State claiming lands under grants of different States. All other cases go before State courts. The judicial system of the several States is entirely independent of and unconnected with the judicial system of the United States. Remedies provided by the State statutes, however, may be enforced in the federal courts if such courts have jurisdiction otherwise. The procedure in the federal courts conforms to a large extent to the procedure in the States

⁶ See C. N. Callender, *American Courts; Their Organization and Procedure* (New York, 1927); Felix Frankfurter and J. M. Landis, *The Business of the Supreme Court; a Study in the Federal Judicial System* (New York, 1927).

where the various federal courts sit. Furthermore, under the Fourteenth Amendment to the Constitution of the United States it has been possible to bring into the federal courts many cases originating in the State courts, on the ground that the latter failed to give "due process of law," or "equal protection of the laws."⁷

The Constitution does not specifically grant to the federal courts exclusive jurisdiction of any subjects whatever. Congress has power to determine by law which cases shall be handled exclusively by the federal courts. The exclusive jurisdiction of the federal courts at the present time includes all crimes and offenses cognizable under the authority of the United States; all suits for penalties and forfeitures incurred under the laws of the United States; all civil cases of admiralty and maritime jurisdiction (with certain exceptions); all seizures under the laws of the United States; all prizes and proceedings for the condemnation of property taken as prize; cases arising under the patent-right or copyright laws of the United States; bankruptcy proceedings; all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and the citizens of other States or aliens; suits and proceedings against ambassadors or public ministers or their domestics, or against consuls or vice consuls.⁸

In practically all other cases that come within the judicial power of the United States, the federal courts and the State courts have concurrent jurisdiction.⁹ The party instituting such a case has the option of starting his action in the courts of the State where he or the defendant resides, or of bringing it in a federal court. Even where the case is started in a State court it may be removed to a federal court, on the ground of diversity of citizenship or the plea that a right or immunity is called in question which is based upon the national Constitution, national laws or treaties.

⁷ *Constitution*, Art. III, Sec. 2.

⁸ *Code of Laws of the United States*, Title 28, Ch. 10, Sec. 371.

⁹ See Felix Frankfurter, "Distribution of Judicial Power between United States and State Courts," *Cornell Law Quarterly* (June, 1928), Vol. XIII, No. 4, pp. 499-530. This article is of value for its criticism of many features of the present system of distribution of powers.

THE NATIONAL JUDICIAL SYSTEM. The national judicial system consists of ordinary courts and special courts. The ordinary courts are: District Courts, Circuit Courts of Appeals, and the Supreme Court of the United States. Among the special courts are: the courts of the District of Columbia, which include the Municipal Court, the Police Court, the Juvenile Court, the Court of Appeals of the District of Columbia, and the Supreme Court of the District of Columbia; the Court of Claims; the Customs Court; and the Court of Customs and Patent Appeals.¹⁰

The lowest federal courts are the District Courts, of which there are some eighty-four, not including district courts for Alaska, Hawaii, Porto Rico, and the Canal Zone, and the courts of the District of Columbia. If the State is small, the State itself may constitute a district. The larger and more populous States, however, are divided into two or more districts. In every district there is at least one district judge, appointed by the President with the advice of the Senate on the recommendation of the Attorney General. In larger and more important districts, such as the southern district of New York, there may be as many as five or six district judges. Where this is so, the court sits in "divisions," each division being presided over by a single judge. Connected with each court is a court clerk, a United States Attorney, numerous assistant attorneys (sometimes as many as fifty), a United States marshal, and in most cases a United States probation and parole officer.¹¹

These courts have jurisdiction over crimes against the federal laws, admiralty cases, cases arising under the internal revenue, postal, copyright, bankruptcy, and patent laws, and a great variety of other cases.

Next in the hierarchy of ordinary federal courts stand the Circuit Courts of Appeals, established for the purpose of relieving the burden of the Supreme Court. One such court sits in each of the ten judicial circuits into which the United States

¹⁰ *Register of the Department of Justice and the Courts of the United States* (Washington, D. C., 1934), 37th ed., pp. 23-118.

¹¹ *Official Register of the United States* (Washington, D. C., 1931), pp. 153ff.

has been divided.¹² This court consists of at least three judges. At present most of the circuits have more than three judges, due to the creation of additional positions by special acts.

The circuit judges are appointed by the President and are confirmed by the Senate. They hold office during good behavior. The Chief Justice and the associate justices of the Supreme Court are allotted among the circuits by order of the Court.

The Circuit Court of Appeals has no original jurisdiction. Its work consists of hearing cases appealed from the district courts, reviewing judgments of the district courts that exercise concurrent jurisdiction with the Court of Claims in adjudicating claims against the United States, and reviewing and enforcing certain classes of orders issued by the Federal Trade Commission, the Interstate Commerce Commission, and the Federal Reserve Board.¹³

The Supreme Court of the United States does not (as do the Reichsgericht in Germany, the Court of Cassation in France, and the Supreme Court of Judicature in England) act as the final appellate tribunal for all civil and criminal cases coming up from lower courts. It stands at the head of the federal judicial system, but has no such relationship to the judicial systems of the States, despite the fact that some cases, especially those involving a question of rights safeguarded by the federal Constitution, come up from the State courts to the Supreme Court of the United States.

The Supreme Court was established by the federal Constitution itself, although most of the details as to salary, number of judges and organization are left for congressional action. The judges of the Supreme Court, of whom there are at present nine, are appointed by the President of the United States with the consent of the Senate, for life or during good behavior. The salary of the associate justices is \$20,000 per year, and that of the chief justice \$20,500.

¹² For the States comprised within each judicial district, see *Register of the Department of Justice and the Courts of the United States* (Washington, D. C., 1931), 36th ed., pp. 16-17.

¹³ *Judicial Code*, 1925, 43 Stat., Ch. 229, pp. 936-937.

The jurisdiction of the Supreme Court has been narrowed more than once since 1891, when the Circuit Courts of Appeals were established as intermediate courts of review. The same act which established them also conferred upon the Supreme Court the right to decline to review cases of certain kinds, if they did not seem to be of sufficient importance to warrant review. An Act of 1925 had the effect of reducing the number of cases coming before the Supreme Court, since it made additions to the categories of cases in which the use of the writ of certiorari applies. Cases in these categories may not be brought before the Supreme Court as a matter of right; but the Court decides in each instance whether or not it will take jurisdiction. The Act of 1925, according to Judge Taft who was largely responsible for its adoption, is based on the principle "that the litigants have their rights sufficiently protected by a hearing or trial in courts of first instance, and by one review in an intermediate appellate Federal Court. The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court. Such cases should include issues of the Federal constitutional validity of statutes, Federal and State, genuine issues of constitutional rights of individuals, the interpretation of Federal statutes when it will affect large classes of people; questions of Federal jurisdiction, and sometimes doubtful questions of general law of such wide application that the Supreme Court may help remove the doubt."¹⁴

THE STATE COURT SYSTEM. Each State in the United States has its own court system, which is under no direct control by the national government. Each State determines what courts it will establish, what their jurisdiction shall be, how their judges are to be selected, and so on. The judicial organization of the States varies widely, but there are certain broad elements of likeness.

¹⁴ William H. Taft, "The Jurisdiction of the Supreme Court under the Act of February 13, 1925," *Yale Law Journal* (November, 1925), Vol. XXXV, No. 1, pp. 1-12. See also Frankfurter and Landis, *op. cit.*, Ch. VII.

At the bottom of the State judicial system stand the justices of the peace, who have a very limited inferior jurisdiction in both criminal and civil cases. They are usually elected from the small areas within which they serve. They generally receive payment from fees, and their courts are not courts of record.

All States have a general trial court, called by such names as County Court, District Court, Circuit Court of Common Pleas, Court of Oyer and Terminer, and so on.¹⁵ This court, as a rule, has general trial jurisdiction in all cases of law and equity.

The highest State court is commonly called the Supreme Court, although in a few States it has a slightly different name. In Connecticut, this court of last resort is known as the Supreme Court of Errors; in New York, Maryland and Kentucky, the Court of Appeals; in Maine and Massachusetts, the Supreme Judicial Court; in Virginia and West Virginia, the Supreme Court of Appeals; and in New Jersey, the Court of Errors and Appeals. The highest court is customarily given a certain original jurisdiction, but as a rule this is small and is very strictly limited by law. The main function of this court is to hear appeals from the lower courts. In some states there are district courts of appeals between the general trial court and the Supreme Court.

Beside these types of courts, there are in some States a variety of special courts which cannot be discussed here, such as Probate Courts, Orphans' Courts, Courts of Chancery, Courts of Insolvency, Juvenile Courts, Traffic Courts and Municipal Courts.

The State courts are rarely organized on a unified basis. As a rule no provision is made that judges may sit in any jurisdiction but their own. No one is responsible for the administration of the whole court system; consequently judges may sit idle in one locality, while the courts are months or even years behind their dockets in another jurisdiction. In very few instances are judges considered judges for the whole State.

¹⁵ For list of the names of the courts of the different States as of December, 1926, see manuscript prepared by the Legislative Reference Division of the Library of Congress, published in W. F. Willoughby, *op. cit.*, pp. 367ff.

The Judicial System of England

GENERAL PRINCIPLES OF THE ENGLISH SYSTEM. It was previously explained that the legal system of England is based upon the common law. As in the United States, statutory law has greatly modified the common law. Nevertheless, "the statutes assume the existence of the common law. They are the addenda and errata of the book of the Common Law. Where Statute Law and Common Law come into conflict, Statute Law prevails; and no development of the Common Law can repeal an Act of Parliament."¹⁶

The English judicial system is fairly well integrated and unified. The entire court system is governed by national law. The Judicature Act of 1873 codified the whole judicial system, and gave to one and the same tribunal the jurisdiction which previously had been exercised separately by the courts of equity and the courts of common law. It established for all the divisions of the court a uniform system of procedure and pleading, and provided for the enforcement of the same rule in cases where chancery and common law had previously had different rules. The Supreme Court of Judicature replaced more than a dozen former courts¹⁷ by the establishment of a single court of first instance, known as His Majesty's High Court of Justice, and a single Appellate Court, known as His Majesty's Court of Appeal. The Supreme Court of Judicature Act of 1925 consolidated former acts relating to the administration of justice.

ORGANIZATION OF THE COURTS IN ENGLAND. No one form of judicial organization exists throughout the entire United Kingdom. England and Wales have one system, Scotland another, and there is a still different one for northern Ireland. The following discussion is confined to the court systems of England and Wales.

¹⁶ J. J. Clarke, *Outlines of Central Government* (New York and London, 1928), 3d ed., pp. 111ff.

¹⁷ Common law, King's Bench, Exchequer, Common Pleas, Exchequer Chamber, Chancery, Appeal in Chancery, Admiralty, Probate, Divorce and Admiralty Causes, London Court of Bankruptcy, Common Pleas at Lancaster, Common Pleas at Durham.

Before the judicial reform movement of 1873 to 1876, England had a confused judicial system consisting of many courts with special jurisdictions. There were inevitable conflicts of jurisdiction and duplications of effort, especially since there was no unified administrative control. Each tribunal had its own forms of practice and procedure. The result was almost chaotic.¹⁸

Much of this confusion was ended by the so-called Judicature Act of 1873,¹⁹ and subsequent acts which changed the judicial system.²⁰ As the result of these various acts, taken together with former statutes, the chief courts of England today consist of the House of Lords, the Judicial Committee of the Privy Council, the Supreme Court of Judicature (which includes a number of courts, and consists of two principal divisions, His Majesty's High Court of Justice and His Majesty's Court of Appeal), the Court of Criminal Appeal, county courts, courts of criminal jurisdiction, and a variety of other courts of special or local jurisdiction, such as courts having jurisdiction in lunacy, courts-martial, Courts of Escheat, Forest Courts, the Court of Chivalry, Palatine Courts, Courts of the Cinque Ports, and so on. It will be impossible to describe these special or local courts.²¹

Unlike France and Germany, England has developed no system of administrative courts. Like the United States, however, she has established numerous boards, commissions, and other authorities which in many ways act as administrative tribunals. Among the most important of these are: the Railway Courts, the Ministry of Health, the London Building Tri-

¹⁸ For brief descriptions of the English system see W. E. Higgins, "Certain Features of the English Civil Courts and Their Procedure Which Lessen Delay and Tend to Secure the Determination of the Merits of Actions at Law," *American Judicature Society Bulletin* (1916), No. 11; F. A. Ogg, *English Government and Politics* (New York, 1929), Ch. XXVI; *Halsbury's Laws of England* (London, 1907-1917), Vol. IX, pp. 19ff.; William Blake Odgers and Walter Blake Odgers, *Odgers on the Common Law of England*, 3d ed., by Roland Burrows and others (London, 1927).

¹⁹ 36 and 37 Vict. c. 38.

²⁰ All these acts were brought together in the Consolidation Act of 1925, 15 and 16 Geo. 5, c. 49. Amended in some particulars by the Administration of Justice Act of 1928.

²¹ The student should see *Halsbury's Laws of England*, Vol. IX, pp. 94-222 for these various special or local courts.

bunal, the District Auditor, the National Health Insurance Tribunals, the tribunals for Unemployment Insurance, the Board of Education, the Board of Trade, the Pension Tribunals, and so on.²² Many of these tribunals have rule-making powers, as well as administrative powers, and powers to pass upon particular cases as they arise.

THE HIGH COURT OF PARLIAMENT. One of the functions of the House of Lords consists in serving as a final appellate tribunal from any judgment or order of the Court of Appeal in England, or any court of Scotland or Ireland from which error or appeal lay to the House of Lords by common or statute law.²³ Although all the members of the House of Lords have a theoretical right to determine legal questions, for years no lay member has attempted to do so. The function today is performed by the Lord Chancellor, the Lords of Appeals in Ordinary, and any peers in Parliament who have held judicial office, such as persons who have been Lord Chancellors, paid judges of the Judicial Committee of the Privy Council, and judges of the Supreme Court of England or Ireland and the Court of Session of Scotland. The Lord Chancellor, if present, presides over the judicial deliberations of the House in regard to appeals.

The original jurisdiction of the House of Lords as a High Court consists of the right to try a peer or peeress for treason, felony or misprision; the trial of impeachment proceedings against any subject, whether peer or commoner, initiated by the House of Commons; procedure against accused persons by bill of attainder, which is legislative in form; and various minor affairs. In all cases the House of Lords has power to call judges to assist its deliberations by giving opinions on any points of law that may arise. Both the Attorney General and the Solicitor General may be called upon for advice.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. The Judicial Committee of the Privy Council was established in

²² W. A. Robson, *Justice and Administrative Law; a Study of the British Constitution* (London, 1928), *passim*.

²³ *Halsbury's Laws of England*, Vol. IX, p. 22.

1833.²⁴ The Committee consists of the President of the Council, the Lord Keeper or first Lord Commissioner of the Great Seal of England, and all privy councillors who have held these offices, or who hold high judicial office. Two additional members may be appointed by the Sovereign. Certain other persons who are or have been judges in parts of the British Empire are also members of the Judicial Committee.²⁵

The function of this committee is "to hear appeals to His Majesty in Council." Jurisdiction is bestowed upon the Judicial Committee by an Order in Council, directing that all appeals or petitions of a certain type shall be referred to the Judicial Committee. Such order is made from time to time and remains in force until it is rescinded. Where there is no general order, a special order is necessary in case of each appeal. The appellate jurisdiction of the Judicial Committee has to do with admiralty matters, certain ecclesiastical cases, copyrights, appeals from certain courts outside the United Kingdom, and a few other questions.²⁶

THE SUPREME COURT OF JUDICATURE. Probably the most important court in England, from the viewpoint of the extent of business that it handles, the ability of its judges and other judicial officers, and the way in which it is organized, is the Supreme Court of Judicature. This court was established by the Judicature Act of 1873²⁷ through the consolidation of numerous special or independent courts.²⁸

The more important features of this organization were the setting up of a single court, complete in itself, which would embrace all former special courts and jurisdictions; and the inclusion within the court, merely as one of its branches, of a single court of final appeal. In this way within the first branch there was established a court of first instance having original juris-

²⁴ Judicial Committee Act, 1833, 3 and 4 Will. c. 41.

²⁵ *Halsbury's Laws of England*, Vol. IX, pp. 27-28.

²⁶ For the acts governing colonial appeals see *The Laws of England, Supplement* (London, 1932), Vol. IX, No. 52.

²⁷ 36 and 37 Vict. c. 66.

²⁸ The High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy.

diction over a variety of subjects formerly vested in special courts, cases in law, equity, admiralty, bankruptcy, probate, and divorce. The Court of Appeal would be the authority for receiving all such cases.²⁹ Other noteworthy features of this reorganization were: placing this important court system under the administrative direction of the Lord Chancellor; providing for a "rules committee" to make rules governing its own procedure; establishing a central office for the care of its papers and documents and the management of most of the clerical and administrative business. In other words, a unified system was established.

The court consists of two large permanent divisions, the High Court of Justice and the Court of Appeal. The High Court of Justice is divided into three main divisions, the Chancery Division, consisting of the Lord Chancellor, as president, and six associate judges; the King's Bench Division, consisting of the Lord Chief Justice as President, and seventeen associate judges; the Probate, Divorce and Admiralty Division, consisting of a president and two associate judges. Any judge may be transferred from one division to another. An interesting provision of the act reads as follows: "Without prejudice to the provisions of this Act relating to the distribution of business of the High Court, all jurisdiction vested in the High Court under this Act shall belong to all the Divisions alike."³⁰

An important feature in the organization of this court is the fact that certain judicial functions usually performed in the United States by judges are assigned to such officers as masters, registrars, and referees. Thus, as is the case in the Council of State in France, the judges are able to devote practically all of their time to actual trials. There are thirty-two masters who have rather wide powers in transacting certain kinds of business. In the Chancery Division the judges have "power, subject to the rules, to order what matters shall be heard and investigated by their masters, either with or without their

²⁹ See Roscoe Pound, "Organization of Courts," *American Judicature Society Bulletin* No. 6, pp. 17-18.

³⁰ The Supreme Court of Judicature (Consolidation) Act of 1925, 15 and 16 Geo. 5, c. 49.

direction, during their progress.”³¹ The masters are often ordered to make investigations or look into accounts, thus saving much time for the judges. In the King’s Bench Division, the masters may transact the same kind of business as a judge, with certain exceptions. They sit to pass upon such matters as pleading and practice, relieving the judges of heavy burdens.

There are twenty registrars who help lessen the burden of the judges in various ways. Three official referees hear and pass upon such cases as are assigned to them. In the Chancery Division, a judge may call upon accountants, merchants, engineers, actuaries or other persons possessed of special knowledge, for their advice.³²

The Court of Appeal is constituted of ex-officio judges and five ordinary judges. The ex-officio judges are the Lord Chancellor, any person who has held the office of Lord Chancellor, any Lord of Appeal in Ordinary who at the date of his appointment would have been qualified to be appointed an ordinary judge of the Court of Appeal, the Lord Chief Justice, the Master of the Rolls, and the president of the Probate Division. The other judges are appointed by the King. The ex-officio members serve only when some emergency requires them to do so. The Lord Chancellor is the administrative head of the court, with the title of President. The court, as a rule, sits in two divisions; but it is authorized by law to increase them to three, by the temporary addition of justices from the High Court.

The High Court of Justice sits in London, but at certain times during the year a few judges are sent into the various counties to dispose of civil and criminal business, including the trial of civil cases.³³

THE COUNTY COURTS. The present-day county court system of England was established by the County Courts Act of 1846.³⁴ The jurisdiction of these courts has been enlarged and

³¹ Rules of the Supreme Court, 1883, Order 55, Rule 15.

³² Rules of the Supreme Court, 1883. In the *Annual Practice*, 1932, Order 55, Rule 19.

³³ Supreme Court of Judicature (Consolidation) Act, Secs. 70-72.

³⁴ 9 and 10 Vict. c. 95.

the practice before them has been amended, by a series of subsequent County Court Acts which were consolidated by the Act of 1888.³⁵ Further jurisdiction was granted by the County Courts Act of 1903.³⁶ The County Court has jurisdiction exclusively in civil cases, over small claims; also over such matters as replevin, specific performance, the granting of mandamus or injunction, power to appoint a receiver, ejectment, small contracts, torts, and so on. Many special acts have extended its jurisdiction.³⁷

For county court purposes England is divided into between five and six hundred districts. The Lord Chancellor by order from time to time may alter the number and the boundaries of these districts, and the place of holding court, or may order the discontinuance of a court or the consolidation of two or more districts. It is the object of this law that the county court districts shall be established conformably with the areas of local government, and that they shall meet the requirements of different localities.³⁸ The Lord Chancellor also has power to alter the distribution of the districts among the judges and to remove a judge from one district to another. There are at the present time fifty-five county court judges who travel in circuits. These judges are appointed for life by the Lord Chancellor.

CRIMINAL COURTS. The ordinary criminal courts of England are the Courts of Petty Sessions, the Courts of Quarter Sessions, the Assizes, the Central Criminal Court, the King's Bench Division of the High Court of Justice, and the Court of Criminal Appeal.

(1) *Courts of Petty Sessions.* A Court of Petty Session is composed of justices of the peace, who are appointed by the Lord Chancellor, upon the advice of an advisory committee. These officers hold office for life, but may be removed for misconduct. They receive no salary. Any two or more justices,

³⁵ 51 and 52 Vict. c. 43.

³⁶ 3 Edw. VII, c. 42.

³⁷ For the general jurisdiction of the county courts, and that granted under special acts, see *Halsbury's Laws of England*, Vol. VIII, pp. 428 ff.

³⁸ See *Yearly County Court Practice*, 1932, pp. 3, 4.

acting in their own division and sitting in their usual court house, constitute a court of petty sessions. Many modern statutes have conferred upon these courts quite extensive jurisdiction, "because they are the most readily accessible of our judicial officers, and the proceedings before them are short, simple and inexpensive." They deal with many civil or quasi-civil matters, such as disputes concerning contracts between masters and servants. They have power to deal summarily with many minor criminal matters, and under certain conditions with some indictable offenses. They also have functions to perform in connection with cases that may subsequently be tried by jury on indictment. One justice can conduct an examination, but two justices are regularly required to decide a case summarily.³⁹ In London, Metropolitan Police magistrates, and in a few large cities, paid magistrates, exercise the office of justice of the peace.

(2) *Courts of Quarter Sessions.* A Court of Quarter Sessions is composed of all of the justices of the county, although two justices are sufficient at any one trial. The court sits in two divisions, if necessary, with at least two justices for each division. The criminal jurisdiction of quarter sessions is both original and appellate. The original jurisdiction consists of hearing and passing upon indictments, informations or presentments for any offense committed within the county, with certain exceptions.⁴⁰ The appellate jurisdiction is based on the fact that any person aggrieved by any conviction of a court of summary jurisdiction (petty sessions), may appeal against his sentence.⁴¹

(3) *Assizes.* The modern Assizes developed from the practice of sending out members of the King's Court to try cases in the counties. England and Wales are divided into eight circuits, over which the judges of the High Court travel, holding court at the "assize towns" in these circuits. The judges

³⁹ Odgers, *op. cit.*, Vol. II, pp. 339 ff.

⁴⁰ *Halsbury's Laws of England*, Vol. IX, p. 85; for the exceptions see Odgers, *op. cit.*, Vol. II, pp. 344, 345.

⁴¹ See Criminal Justice Administration Act of 1914, and Criminal Justice Act of 1925.

of Assize may try all persons against whom an indictment has been presented within the county of the Assize, and other persons who are brought before them charged under a criminal information or a coroner's inquisition. They may also try civil actions. A Court of Assize has no appellate jurisdiction.⁴²

(4) *The Central Criminal Court.* This court is composed of the Lord Chancellor, judges of the High Court, the Lord Mayor, aldermen, recorder, and common sergeant of the City of London, and one or more commissioners. Though all the judges have equal rank, it is contrary to practice for the Lord Mayor and aldermen to take any active part in the trials. This court tries indictable offenses arising within the City of London, the counties of London and Middlesex, and certain specified portions of neighboring counties. It also tries certain cases especially assigned to it.

(5) *The King's Bench Division of the High Court.* This court is composed of the Lord Chief Justice as president, and seventeen judges, and exercises jurisdiction in three different capacities: (a) As a court of first instance it acts as an assize court for the ancient county of Middlesex. It can also try any misdemeanor committed in any part of England, where the criminal information has been filed by some Crown officer. (b) Any indictment from any inferior court may be removed to the King's Bench Division for trial by a writ of certiorari, and tried (unless otherwise ordered) by a jury of the county within which the crime was committed. The order for removal may be made only on one of the following grounds: that, owing to local partiality and prejudice, a fair and impartial trial cannot be had in the court below; that questions of law of unusual difficulty or importance are likely to arise; and that a special jury or a view of certain premises is necessary for a satisfactory trial, and cannot be obtained in the lower court.⁴³ (c) Perhaps the most important function of the King's Bench Division is its appellate and controlling jurisdiction. This court can order that the proceedings of any

⁴² Odgers, *op. cit.*, Vol. II, pp. 347, 348.

⁴³ Crown Office Rules, 1906, pp. 13ff.

inferior court shall be brought before it, and may have them quashed, if irregular, whether they relate to the gravest charge or the least misdemeanor affecting the public welfare. This power is usually exercised by a Divisional Court consisting of three judges. The King's Bench Division may order any inferior court to do its duty, by a writ of mandamus or an order in the nature of mandamus. It may order an inferior court to keep within its jurisdiction, by a writ of prohibition. One who has been convicted in petty sessions may apply to the King's Bench Division for a writ of certiorari, on the ground that the lower court had no jurisdiction or exceeded its jurisdiction, or that there was some defect or violation of form apparent on the face of the proceedings before the justices, or that the conviction was obtained by fraud.⁴⁴

(6) *The Court of Criminal Appeal.* The Court of Criminal Appeal is composed of the Lord Chief Justice of England and eight judges of the King's Bench Division of the High Court, appointed for this purpose by the Lord Chief Justice with the consent of the Lord Chancellor, for such a period as he thinks desirable in each case.⁴⁵ The court is properly constituted for business if there are present at least three judges. The number must always be odd, and a majority decision prevails.⁴⁶ The court sits in London unless directed otherwise.

The court has jurisdiction over all criminal cases tried at Quarter Sessions, the Assizes, the Central Criminal Court, or in the King's Bench Division, either on an indictment, a criminal information or a coroner's inquisition. A person convicted on indictment may appeal against his conviction on any ground of appeal which involves a question of law alone. With the leave of the Court of Criminal Appeal, or upon the certificate of the judge who has tried him that it is a fit case for appeal, a person may appeal to this court against his conviction on any ground which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the court to be sufficient ground for appeal. With the leave

⁴⁴ See Odgers, *op. cit.*, pp. 348ff.

⁴⁵ Criminal Appeal Act of 1907, 7 Edw. VII, c. 23.

⁴⁶ *Ibid.*, Sec. I.

of the Court of Criminal Appeal, a person may appeal against the sentence passed on his conviction, unless the sentence is one fixed by law. In such a case the prisoner runs some risk, for the court may, if it thinks proper, quash the sentence appealed against and inflict a heavier one.

The French Judicial System

GENERAL PRINCIPLES OF THE FRENCH SYSTEM. France has a completely unified judicial system, which is controlled in every particular by national law. National law establishes the courts; provides for the qualification, appointment, tenure of office, removal and retirement of judges; organizes all the prosecuting authorities and executory officers of courts; prescribes court procedure, and so on.

The French law is largely based on the Roman law. Except for administrative law, it is highly codified. Beside the Civil and Criminal Codes and the Codes of Civil and Criminal Procedure, France has a Commercial Code, a Forestry Code, a Maritime Code, a Labor Code, and other codes.

Until the beginning of the nineteenth century, the legal regime of France was one of great diversity, if not of chaos. After three unsuccessful attempts at codification had been made, a consular decree of July 13, 1800, appointed a commission which presented a preliminary plan for a civil code. After this plan had been submitted to the Court of Cassation, the Courts of Appeal, and other qualified consultants, and had received certain amendments, it was laid before the legislature as the official project of the government. The various titles of the code were approved separately. The whole code was approved as one body on March 21, 1804, and was promulgated under the title *Code civil des Français*. The Code of Civil Procedure went into effect in 1807. The Code of Commerce adopted the same year went into effect in 1808. The Code of Criminal Procedure and the Penal Code went into effect in 1811. The other codes are of a somewhat later date.⁴⁷

⁴⁷ See C. S. Lobingier, "Napoleon and His Code," *Harvard Law Review* (December, 1918), Vol. XXXII, No. 2, pp. 114-134; A. Esmein, *Précis élémentaire de l'histoire du droit français de 1789 à 1814* (Paris, 1911).

Although there is a so-called Administrative Code, it is not a code in fact, since it is a mere compilation in chronological order of important laws, ordinances, and the like, applying to administration. It was never systematically drawn up, and then approved by the legislature.

THE ORDINARY COURTS. The judicial system of France, like that of Germany, includes both regular courts and administrative courts.

The regular courts are divided into two classes: tribunals with ordinary jurisdiction, and tribunals with extraordinary jurisdiction. Tribunals of ordinary jurisdiction are the regular civil and criminal courts and the courts of appeal. Tribunals of extraordinary jurisdiction are the courts of justices of the peace, the trade councils, and the tribunals of commerce.

Two very important differences exist between the ordinary and the extraordinary jurisdictions. First, the jurisdiction of the ordinary tribunals is broad and general, but the extraordinary tribunals have an enumerated competence, or a competence that is strictly limited. Second, in the ordinary tribunals the judges take jurisdiction of the execution of the sentences imposed by themselves, whereas in the extraordinary jurisdictions the judges do not enforce their own decisions. Both kinds of courts may include civil and criminal jurisdiction.

(1) *Courts of First Instance.* In each department of France there is at present a *tribunal de première instance*, a Court of First Instance.⁴⁸ In all except a few departments, the court is divided into two or more sections, each of which has a fixed place of sitting, and a separate personnel of magistrates.⁴⁹ Each of these courts must consist of a president, in some cases of one or more vice presidents, one or more examining judges, from one to three ordinary judges, a public prosecutor, and the necessary assistant or substitute judges, court clerks, and so on. The public prosecutor is made an integral part of each tribunal. In each departmental tribunal, *tribunal d'arrondissement*, the president has general direction over the work and over

⁴⁸ Decree of September 3, 1926.

⁴⁹ Decree of January 28, 1930.

the maintenance of proper discipline. Where there are several chambers, one of these is in charge of the president of the court; the others are in charge of vice presidents. The president, however, may preside over any chamber at his own discretion.

At least three judges must sit in the decision of any case, and an odd number must always deliberate upon a case. Judgments are rendered by a majority vote. When the number of ordinary judges is insufficient for the giving of a judgment, the tribunal or the chamber, as the case may be, is completed either by taking an ordinary judge from another chamber, or by calling in an assistant judge or even a barrister or solicitor, to complete the bench.

It is the function of the president of the Court of First Instance to distribute the affairs that come before it in such a way as makes for the expedition of business. For certain purposes, including the hearing of the prosecutor general or the prosecutor of the republic concerning the execution of laws and regulations, the examination of projects of law, the selection of members of the bureau of judicial assistance, the decision of matters of discipline, the discussion of matters of internal administration, and so on, tribunals of the first instance meet in general assembly. When the general assembly must make an official decision, it is composed only of the judges in active service, a majority of whom must be present.

The tribunals of first instance have a general civil jurisdiction, except for that which is formally given to the justices of the peace, the tribunals of commerce and the trade councils. In principle, they have no jurisdiction in criminal or administrative cases; but they may decide civil suits concerning the reparation of injuries resulting from crimes and misdemeanors, when these are separate from the criminal suits. They may also decide upon commercial affairs when a tribunal of commerce does not exist within their jurisdiction. As originally organized, the Courts of First Instance took jurisdiction over civil matters and also over certain infractions of the law which were called by the general title of matters of correctional police. This may still be the case if the court is so small as to

consist of only one chamber. When the tribunal of first instance is composed of several chambers, jurisdiction over correctional affairs is bestowed on one or more of these. With a few special exceptions, any misdemeanor which is punishable with imprisonment of from six days to five years, or with fines to a maximum prescribed by law, is within the jurisdiction of the tribunals of correctional police. These courts have no competence over infractions of the law classified by the code as crimes.

(2) *Local Judges.* The first president of the Court of Appeals may by decree, after receiving the advice of the prosecuting attorney, order that a judge of a departmental tribunal shall sit periodically in a town which was formerly the seat of the tribunal of the arrondissement, or of any other division of the departmental tribunal. Within the geographical boundaries of the arrondissement where he sits, this judge may perform acts which would otherwise belong to the functions of the president of the tribunal of the first instance. He has the right to make investigations in criminal matters, to judge cases which the law permits to be decided by a single judge, and to execute all judicial commissions confided to him by the examining judge of the departmental tribunal, or of the section of such tribunal to which he belongs.⁵⁰

(3) *Courts of Appeals.* There are twenty-seven Courts of Appeals, *cours d'appel*, in continental France. The territorial jurisdiction of these courts varies from one department to three or four. The Court of Appeals of Paris has jurisdiction over six departments. Each Court of Appeals is composed of a first president, several presidents of chambers, a considerable number of councillors, a prosecuting attorney, several advocates and substitutes, and clerks and assistant clerks. The Court of Appeals at Paris is under a special organization.

The majority of these courts are divided into chambers, usually two, three, or four. In Paris, however, there are ten chambers. Each chamber has a president. Beside the regular

⁵⁰ Decree of November 15, 1926, Arts. I, II, Duvergier, *Lois*, N. S. 26, p. 775.

chambers for hearing cases, every Court of Appeals contains a chamber of indictment composed of five judges. In special circumstances, or because of a rush of business, two chambers of the court (or in the smallest courts, the chamber of indictment and that of correctional appeals) may unite to pronounce upon an indictment. The chamber of indictment examines the records and documents in correctional appeals, and decides whether or not the cases should be prosecuted further. It also has certain rights of supervision in correctional cases.

These courts receive appeals in both civil cases and correctional police cases. These are handled, as a rule, by separate chambers, but the law provides for a certain degree of flexibility in this respect.

(4) *Assize Courts.* Assize Courts, *cours d'assises*, are held quarterly in each department, for the trial of criminal cases. A presiding judge who is one of the councillors of the Court of Appeals, and two associate judges, constitute the bench. Provision is made for the presence of substitute judges. The state is represented by the prosecutor general, or by some other officer charged with the function of guarding the general interests.

The important feature of the Assize Court is the jury. Each department prepares an annual list of names of persons eligible for jury duty. A panel of thirty-six is drawn each quarter, as the "session jury" for the Assize Court. For each case to be tried, a "jury of judgment" is formed by the selection of twelve members of the larger jury, by lot, subject to challenge by either the accused or the state, within limits that permit the formation of the requisite group of twelve. Sometimes one or two substitute jurors are added, who are to listen to the proceedings, but not to participate in the discussions or in the vote unless a regular juror is prevented from serving. A majority vote of the jury is sufficient for a verdict.

(5) *Justices of the Peace.* The justices of the peace in France act in a two-fold capacity. In civil cases they are called justices of the peace; in misdemeanor cases they are called police judges, and their courts are called tribunals of ordinary

police. In principle there is a justice of the peace in each canton, except in the Department of the Seine, which is under a special dispensation. During recent years the number has been lessened by giving the office of justice of the peace in two or more cantons to one person.⁵¹

Justices of the peace perform several functions. One of the most important is to act as conciliators. The law provides: "No principal claim introduced into a suit between parties capable of making a compromise, and upon matters which may be the subject of compromise, shall be received into the tribunals of first instance until the defendant has first been called in conciliation before the judge of the peace, or unless the parties have made a voluntary appearance there."⁵²

In very minor actions concerning either persons or property, justices of the peace act as civil judges of both first and last resort. When the amounts concerned are slightly higher, they judge in first instance only. In police tribunals they judge various misdemeanors called police contraventions. In correctional and criminal matters, justices of the peace serve under different circumstances as auxiliaries of the public prosecutor or as delegates of the examining judge.

(6) *Commercial Tribunals.* It has long been French practice to bring disputes over business and commercial matters before special tribunals known as *tribunaux de commerce*, that is, Commercial Courts or tribunals of commerce. The judges of these courts are not professional judges, but are elected by persons engaged in commerce, industry, or business undertakings. They do not receive salaries.

Commercial Courts are composed of a president, two or more other judges, and assistant and substitute judges. Each Commercial Court is composed of a single chamber. The larger courts, however, may be divided into sections which hold their sessions on different days. At least three judges must participate in each decision. Assistant judges take part in the decisions only when the regular judges are absent.

⁵¹ See particularly, decree of September 3, 1926, Duvergier, *Lois*, N. S. 26, p. 611.

⁵² *Code of Civil Procedure*, Art. 48.

The competence of these courts is strictly limited by law. Among the cases which come before them may be mentioned: disputes relating to contracts between dealers, merchants and bankers; disputes between members of commercial associations; and suits over other commercial dealings.⁵³ In the arrondissements where no tribunals of commerce are established, the civil tribunals may exercise this function.

(7) *The Court of Cassation.* At the very summit of the judicial hierarchy in all civil and criminal affairs stands the Court of Cassation. Its chief functions are to unify French jurisprudence and to make possible a uniform application of the laws throughout France. In order to accomplish these ends it is given power to annul or quash (*casser*) decisions from all inferior civil or criminal courts. It is not a court of final resort in administrative affairs, for which the Council of State is the supreme court. Moreover, it is not a trial court. Its duty is to see that trials are fair and decisions are made according to law, in the lower civil and criminal courts.

The Court of Cassation is composed of forty-nine members: the first president, three other presidents, and forty-five counsellors. The court is divided into three chambers: the chamber of petitions, the civil chamber, and the criminal chamber, each composed of sixteen members including the president, except the civil chamber which has seventeen members. The president of the court presides in the chamber which he chooses, usually the civil chamber. There is no rotation of judges, as is the case in some of the other courts of France. In addition to the three chambers into which the court is divided, a superior commission of cassation has been established, to decide upon recourses from sentences of the commissions of arbitration established in 1917.

The chief acts of the Court of Cassation are to pass upon recourses or suits against the decisions of the lower courts that are subject to its authority, and to quash decisions that are in violation of law. If the court decides to quash the case, it does not itself pass judgment upon the subject matter, as does

⁵³ See Law of December 31, 1925, Duvergier, *Lois*, N. S. 25, p. 589.

the Supreme Court of the United States, but (except in a few special instances) sends the case back to a tribunal of the same order as that which made the decision attacked. It should be noted that the case is not sent back to the same court which made the erroneous decision, but rather to another court of the same order. The Court of Cassation takes cognizance of points of law but not of fact.

(8) *The Councils of Prud'hommes.* Advisory councils have been organized for the purpose of settling by arbitration the disagreements over working contracts which may have developed in commerce and industry between employers and their representatives, employees, workers and apprentices. These councils also act as conciliators and judges, when differences arise among the workers in respect to their work.⁵⁴

The local Councils of Prud'hommes are established by decrees which state the number of categories into which the different kinds of commerce and industry are to be divided. The workers and the other employees are classified in distinct categories. The councils are composed of an equal number of each category of employers and workers.

(9) *The High Court of Justice.* The High Court of Justice is a special court which has jurisdiction over certain acts which place the state in peril, or which tries certain persons of particular rank and dignity. It is composed of members of the Senate, assisted by a few judges appointed from among the members of the Courts of Appeal or the Court of Cassation. The President of the Republic and the ministers are the only persons normally within the jurisdiction of this court. The President or any minister may be impeached by the Chamber of Deputies and tried by the Senate. The Senate may also be constituted as a high court of justice, by a decree of the President of the Republic issued in the Council of Ministers, to try all persons accused of attempts upon the safety of the state.

THE ADMINISTRATIVE COURT SYSTEM. According to the French doctrine of separation of powers, as it has developed

⁵⁴ See Law of June 21, 1924, Duvergier, *Lois*, N. S. 24, p. 347.

during the past one hundred and fifty years, the ordinary courts may not interfere with acts of administration. "The judicial functions are distinct and must always remain separate from the administrative functions. The judges may not, under the penalty of dismissal, trouble in any manner whatsoever the operations of the administrative body, nor summon the administrators before them by reason of their functions."⁵⁵ As a result of this doctrine it becomes necessary to have administrative tribunals to pass upon administrative acts.

(1) *Interdepartmental Prefectoral Councils.* The chief administrative courts are the interdepartmental prefectoral councils recently established, the councils of litigation in the colonies, special administrative tribunals, and the Council of State. The interdepartmental prefectoral councils are both consultative councils in matters of prefectoral administration, and administrative tribunals of the first instance. A decree of 1926⁵⁶ abolished the former prefectoral councils, of which there was one for each department, and replaced them with twenty-two interdepartmental councils, plus the three prefectoral councils of Algeria. The prefectoral council of the Seine (that in the Paris region) has a special organization.

The interdepartmental prefectoral councils are composed, at present, of a president and four councillors, one of whom is charged with the functions of a commissioner of the government, also clerical assistants.

The president of the council may designate one or more members of the council to act as "delegated judge" upon quite a large field of matters, subject to recourse to the Council of State.

The functions of the interdepartmental prefectoral council are two-fold, consultative and judicial. Each council must be consulted on certain questions by the prefects of all the departments included within its jurisdiction. As an administrative court of first instance, the council has only the jurisdiction that is expressly bestowed by law. This jurisdiction includes suits involving contracts and damages in respect to public

⁵⁵ Decree upon Judicial Organization of August 16 to 20, 1790, Art. 13.

⁵⁶ Decree of September 6, 1926, Art. 2, Duvergier, *Lois*, N. S. 1926, p. 615.

works; suits incidental to public works; claims concerning direct or similar taxes; election conflicts, suits growing out of sales of national property, and various other matters.

Among the important special administrative tribunals are the Court of Accounts, the Superior Council of Public Instruction, the Councils of Revision, the Prize Council, and the Superior Commission for the Classification of Establishments Liable to the Taxes upon Sales. It is not necessary to discuss these special tribunals in detail, as each has only specific duties to perform.

(2) *The Council of State.* The Council of State, *Conseil d'Etat*, in France is a supreme court in respect to administrative matters. There is no appeal from its decisions to the ordinary courts. It is also an advisory council to the national President and the ministers.

The Council of State is composed of thirty-five councillors of state in ordinary service, thirty councillors in extraordinary service, thirty-seven masters of petitions, and forty auditors, eighteen of whom are of the first class, and twenty-two of the second class. Each of these different groups has special functions to perform.

The councillors of state in ordinary service are the highest, most experienced and most powerful group. They alone make decisions of a judicial nature. The councillors in extraordinary service are high officers of the government or experts who have no deciding vote in administrative suits, but who act in an advisory capacity, particularly in advising upon regulations of public administration issued by the national President, laws, and so on. The masters of petitions are largely concerned with the examination of petitions or cases in a preliminary way. They do not decide cases. The auditors examine and prepare the cases, brief them, gather together all relevant materials, and do everything possible to facilitate decision by the councillors in ordinary service.

When the Council of State sits in general assembly, which it rarely does, the national ministers may sit with it and may speak in an advisory capacity on "non-contentious" matters.

The Minister of Justice has the right to preside over the Council of State, but he seldom exercises this right.

In order to perform all the various functions that are entrusted to it, the Council of State is divided into sections and assemblies. At present there are six sections, two of which are devoted to hearing suits. The other sections perform advisory work in respect to such matters as are indicated by their names: legislation, justice, and foreign affairs; interior, public education and fine arts; finance, war, marine, and colonies; public works, agriculture, commerce and industry, posts and telegraphs, labor and social assistance.

For the purpose of suits, the Council of State is composed of organs of judgment and organs of administration. The organs of judgment are: the section for litigation and its two sub-sections; the special section for litigation and its three sub-sections; and the public assembly deciding in litigations.

The section for litigation is composed of a president and twelve councillors in ordinary service, masters of petitions and auditors of the first class. For the decision of cases this section is divided into sub-sections which have the same power as the entire section.

Within the section of litigation there are established special committees for the preliminary examination of cases. These committees "constitute an organ for investigation and the preparation of materials, who control, stimulate, criticise, ratify or amend the work of the reporter appointed for each affair."⁵⁷ The public assembly for litigation, when deciding actual suits, may not legally pass judgment unless at least eleven of its members having a deliberative vote are present. The total, moreover, must be an odd number.

The powers of the Council of State are both administrative and judicial. It prepares drafts of laws, but does so in an advisory rather than a legislative capacity. There is no limit of the right of the Chambers of Parliament to consult the Council of State in respect to projects of law brought forward either by the legislature or by the government. These projects

⁵⁷ J. Appleton, *Traité élémentaire du contentieux Administratif* (Paris, 1927), p. 315.

are drawn up in the form of bills ready for adoption, usually accompanied by an exposition of the arguments in favor of the bills and each article thereof. The bills thus prepared may be presented to the Parliament by members of the Council of State, selected by the government.

The Council of State also gives advice on many affairs. It must give its advice upon a regulation of public administration issued by the President of the Republic. Numerous laws provide that the government or the President shall perform a certain act with the advice of the Council of State. The Council of State is often consulted by the government in regard to general questions.

In administrative suits, the Council of State is a supreme jurisdiction, in that no appeals lie from its decisions. Its jurisdiction, unlike the jurisdiction of the majority of the highest administrative courts in the German States, is general rather than a limited jurisdiction given by special grant. That is, it has the right of deciding upon administrative cases, without depending upon the authorization of law for each separate kind of claim that is brought before it. Besides this general jurisdiction, it also has jurisdiction that has been specially granted to it by law.

THE TRIBUNAL OF CONFLICTS. The attempt to divide jurisdiction between the ordinary courts and administrative courts will inevitably lead to conflicts. It will not always be evident whether a particular case should be referred to the ordinary courts or to the administrative courts. The conflict may arise either positively or negatively. A positive conflict arises when a tribunal of the judicial order takes jurisdiction over a case which the administration believes should go before the administrative courts, or vice versa. A negative conflict exists when neither the ordinary court nor the administrative courts will take jurisdiction. France has established a Tribunal of Conflicts, *Tribunal des Conflits*, to decide such questions. The impartiality of this tribunal is assured by its composition: the Minister of Justice as president; three members of the Council of State; three members of the Court of Cassation;

and two members and two associate members who are elected by a majority of the other judges. This tribunal decides no cases, but merely determines what jurisdiction should try them.

Summary and Conclusions

The judicial systems which we have just surveyed in outline display striking resemblances and equally striking contrasts. All provide courts so distributed geographically and so related in function that a minor civil or misdemeanor case can be tried by a petty court in the vicinity of the persons or property involved, whereas more important cases can be tried by more formal courts of broader territorial and substantial jurisdiction. All except the most trifling cases, furthermore, may be appealed to a higher court, so that any possible bias or fault in the first hearing may be eliminated in the second. In a few instances more than one appeal is granted. Other legal remedies are also available, differing in different systems.

A further point of resemblance is the use of the jury in criminal cases, and sometimes in civil suits as well. The size of the jury, the proportion required to agree upon a verdict, and the relation of the judge or judges to the jury, differ from one country to the next, and even from State to State in the United States; but the central principle is accepted, that the layman as well as the judge should pass at least on questions of fact, when life or liberty (for a considerable period of time) is at stake.

Among the striking points of difference note the fact that in the United States alone do the courts of each State form a closed system, not regularly integrated with the courts of the central government, and not even subject to general rules and standards set by the latter. In France, Germany, and England, the national legislature and the national ministry of justice (or corresponding authority) can make and enforce regulatory provisions affecting all courts in the country. Moreover, the highest Courts of Appeal receive all important cases, thus preventing the situation which has arisen from time to time in the United States of a widespread popular conviction that certain persons have suffered unjust imprisonment or even death,

merely because the courts of this or that State were unable or unwilling to give them a fair and unbiased trial.

An important difference between the judicial systems of France and Germany, on the one hand, and England and the United States, on the other, is the presence or the absence of a definite system of administrative courts to protect the individual against careless or lawless acts by the public authorities. Through bringing every administrative action that affects the individual under the jurisdiction of an administrative tribunal, by means of sufficiently broad and comprehensive categories, such as "faulty functioning of the service," or "liability of the state for the faults of officers, even the presumptive faults of unknown officers," France seeks and Germany has sought until very recently to protect every person from administrative tyranny or incompetence. This protection is either non-existent in England and the United States, or it consists fundamentally in the right of an injured individual to sue the officer who has injured him—a "right" which is equally unjust to both sides, since it neither assures the individual of adequate compensation, nor protects an officer against ruinous suits for very minor faults and inevitable mistakes.

CHAPTER XVI

GOVERNMENT IN THE TOTALITARIAN STATES

In Russia, Italy, Germany, and many other countries, some of which have never experimented with liberal constitutions, and some of which have recently repudiated such constitutions, totalitarian forms of government have grown up. Italy and Germany have achieved totalitarianism by allowing their respective dictators to make change after change in the existing governmental systems. Russia has achieved it by destroying the old system and substituting therefor a type of government which is different from any previously established in a great state. Various countries have followed one or the other method, according to circumstances.

It is not possible at present to examine the separate problems of government connected with totalitarian states in the same detail with which such problems were examined in respect to democratic states. This is due to several causes: first, the fact that the totalitarian states are all of very recent origin, so that their problems and the solutions thereto are not yet entirely clarified; second, the extreme rapidity with which changes are still taking place; third, the fact that in all the totalitarian states the legislature, so important to democracy, is either abolished or essentially transformed, and the tripartite organization of government with a separation of powers and a system of checks and balances is non-existent. The principal totalitarian states now in existence will be described in outline in this chapter.

A. Russia

The structure of government in Russia, and the entire Union of Soviet Socialist Republics, is based upon a system of Soviets or councils which exercise governmental powers in both

economic and territorial units of all sizes from a single factory or city ward to the entire Union. These councils were formerly arranged in a sort of pyramid, only the lowest level being elected by the people, while each higher level was composed of persons chosen by the Soviets immediately below it. The Constitution adopted in December, 1936, changes this relationship by providing for direct popular election to all Soviets.

The Soviets exercise both legislative and administrative powers. In the upper levels, orders and controls, rather than the direct work of administration, fall into the latter category; but the village Soviets, in particular, may do a good deal of direct administrative work. During the revolutionary period the Soviets exercised judicial powers; but since that time the system of courts has been strengthened and a fairly complete separation of the judicial from the other powers of government, at least in form,¹ has been achieved.

Russia (the Russian Soviet Federative Socialistic Republic) is simply the largest of the eleven Union Republics which are theoretically associated on a basis of equal and voluntary association within the Union of Soviet Socialist Republics.² Although so much larger than its fellows, it is hardly accurate to say that Russia predominates in the Union. Rather is it true that the Communist Party dominates all parts of the Union, including Russia, and that there is an increasing tendency for the party leadership to govern through the central or Union Government rather than through the governments of the Republics.

The Supreme Council of the U.S.S.R.

The legislature of the U.S.S.R. is the Supreme Council of the U.S.S.R. It is a bicameral body. The members of both Houses are directly elected for a term of four years. The members of one House, the Soviet of the Union, are elected

¹ For argument that this separation has little substance, see Arnold Brecht, "The New Russian Constitution," *Social Research*, May, 1937, pp. 176ff.

² The member republics now include the following: The R. S. F. S. R., Ukrainian S. S. R., White Russian S. S. R., Azerbaidjan S. S. R., Georgian S. S. R., Armenian S. S. R., Turkmen S. S. R., Uzbek S. S. R., Tadjik S. S. R., Kazakh S. S. R., and the Kirghiz S. S. R.

from single-member districts on a basis of one to every 300,000 of the population. The members of the other House, the Soviet of Nationalities, are chosen on a basis of equal representation within the various grades of nationality districts. To this House each Union Republic sends twenty-five members, each Autonomous Republic eleven, each autonomous district five, and each national district one. This arrangement bears a certain resemblance to the respective structures of the House of Representatives and the Senate in the United States. The two Chambers are invested by the Constitution with equal and identical powers, including the right to initiate legislation. A majority vote in each Chamber suffices for the passing of a law.

As in the United States, the powers belonging to the U.S.S.R. are specified, and all others belong to the "sovereign" member Republics. The powers of the Union include: foreign trade on a basis of state monopoly; determination of the plans of national economy of the U.S.S.R.; administration of such banks, industrial and agricultural establishments and enterprises, and trading enterprises as are of all-Union importance; administration of transport and communication; organization of state insurance; establishment of basic principles for the use of land, forests, and waters, for education and public health, and for labor legislation; the passing of laws governing the judicial system and judicial procedure; the adoption of civil and criminal codes. The central government has the power to supervise the observance of the Constitution and to ensure that the constitutions of the member Republics are in conformity with the Constitution of the Soviet Union. It will be seen from this list that the Supreme Council, to which all other organs of government are responsible, possesses important legislative powers and important powers of control over administration.

The Supreme Council holds two sessions each year. Its Presidium may call special sessions on the demand of a member Republic or at its own discretion.³

³ For structure and functions of the Supreme Council, see Ch. III, Arts. 30-56, of the Constitution of 1936. A convenient English translation is found in *International Conciliation*, February, 1937.

The Presidium of the Supreme Council

The Presidium, or permanent executive committee of the Supreme Council, is elected by a joint meeting of the two Chambers. It consists of a chairman, eleven vice-chairmen, and twenty-four members. Its powers and duties include the following: convening sessions of the Supreme Council; interpreting laws and issuing decrees; dissolving the Supreme Council under certain conditions and calling new elections; annulling decisions and orders of the Council of People's Commissars in either the Union or a member Republic, on the ground that they fail to conform with the law; changing the personnel of the Union Commissars between sessions of the Supreme Council, subject to later confirmation of the Supreme Council; exercising the right of pardon; appointing and replacing the high command of the armed forces; proclaiming a state of war in case of attack or of the need to fulfil treaty obligations, if the Supreme Council is not in session; proclaiming mobilization; ratification of international treaties; diplomatic appointments, and acceptance of credentials. The Presidium is in continuous session. After the expiration of the term of a Supreme Council, or after a dissolution, the Presidium retains its powers, until the newly elected Supreme Council selects its own Presidium.

The Council of People's Commissars

The Council of People's Commissars, which is elected by a joint session of the Supreme Council, is "the highest executive and administrative organ of state power." It has the right to issue decisions and orders on the basis of law and to supervise execution of the law. Its general functions include: co-ordination and direction of the work of the central and the republican People's Commissariats (administrative departments); adoption of measures for fulfilling the plans of national economy, carrying out the budget, and strengthening the credit and monetary system; adoption of measures for the maintenance of public order, the protection of the interests of the state, and the safeguarding of the rights of citizens;

general direction of the relations with foreign states; determination and direction in respect to military matters; suspension and annulment of decisions and orders given by Councils of People's Commissars, or individual Commissars, of the member Republics, concerning such branches of administration and economy as are within the competence of the Union.

The individual People's Commissars (department heads) of the Soviet Union direct their respective fields of public administration. They possess the power to issue orders and instructions in fulfilment of this function. The departments of Defense, Foreign Affairs, Foreign Trade, Railways, Communications, Water Transport, Heavy Industry, and Defense Industry are All-Union Commissariats. These departments act in all parts of the Union, either directly, or through agencies appointed by them. The Union-Republican People's Commissariats, by contrast, act as a rule through the similarly named People's Commissariats of the individual Republics. These departments are: Food Industry, Light Industry, Timber Industry, Agriculture, State Grain and Livestock Farms, Finance, Domestic Trade, Internal Affairs, Justice, and Public Health.

The Member Republics

The eleven Union Republics are required by the new Constitution, as by the old, to adopt constitutions in harmony with that of the Union.⁴ It will be necessary to examine only one of these constitutions, as the rest follow the same pattern.

The Russian Socialist Federated Soviet Republic

The Constitution of the Russian Republic describes its purpose in the following orthodox Marxian terms: "To guarantee the dictatorship of the proletariat, with the objects of destroying the bourgeois class, ending the exploitation of man by man, and establishing Communism, under which there will be no division into classes and no power of the state." According to Stalin, the earlier part of these objectives has been attained and the first stage of Communism, the Socialist state, has been

⁴ Art. 16.

firmly established. The Constitution declares that all power belongs, not to the people, but to the Soviets of deputies of workers, peasants, Cossacks, and soldiers.

The Supreme Soviet of the R.S.F.S.R.

The Supreme Soviet is the legislature of the Republic. The members of this body are elected for a four-year term directly by the citizens of the Republic. The Supreme Soviet adopts and changes the Constitution of the Republic; defines the boundaries and approves the constitutions of any Autonomous Republics within its territory; approves the economic plan and the budget of the Republic; exercises the power of amnesty and pardon (generally an executive power); names its Presidium and the Council of People's Commissars. It is declared to be the sole legislative authority in the Republic.⁵

The Presidium of the Supreme Soviet of the R.S.F.S.R.

This body is defined as to membership and powers by the Constitution of the Republic. Like the Presidium of the Union, described above, it is a permanent standing committee of the legislature which acts with almost the entire authority of the legislature, between sessions. It normally cooperates smoothly with the Supreme Soviet and issues decrees jointly with that body.

The Council of People's Commissars of the R.S.F.S.R.

Like the identically named body for the Union, this council consists of the executive heads of the various administrative departments. It is declared by the Constitution to be responsible to the Supreme Soviet or its Presidium. The Council of People's Commissars of the Russian Federated Republic consists of a Chairman, Vice-Chairman, the Chairman of the State Planning Commission, the Commissars of: food industry, light industry, timber industry, agriculture, grain and livestock, State farms, finances, internal trade, internal affairs, justice, preservation of health, education, local industry, communal economy, and social security. It should be noted that except

⁵ Arts. 57-63.

for the last-named four, the above Commissariats are all Union-Republican, which means that each is dominated as to general lines of policy by the equivalent Union Commissar. The Russian Council of People's Commissars also contains a delegate of the Committee on Reserves (whose chairman is a member of the Union Council of People's Commissars), the Chief of the Administration of the Arts, and delegates of the All-Union Commissariats.⁶ This last inclusion is unique among federal systems and emphasizes the quasi-federal structure of the Union. It is as if the administrative agencies of the various States of this country were each supplied with representatives of government in Washington, who would attend all the meetings of the Governor and his advisors in order to suggest policies. Although these representatives have, in general, only an advisory voice, it may be assumed that they are quick to note and reprimand any departure from Union policy, and thus to assure that the Republic will not embark upon programs unacceptable to the high command of the Communist Party.⁷

Local Government

Just as we have seen that the Union Government dominates the Republics, so the government of each Republic dominates the government and administration of its subordinate units, including the so-called Autonomous Republics. This is true even in the case of the R.S.F.S.R. which claims to be a federation. The Autonomous Republics and autonomous regions are designed to include nationality groups, which are thus supposed to have a fuller measure of self-government than they could enjoy as part of a larger administrative unit. Each Autonomous Republic has its own constitution, its own Supreme Soviet, Presidium, and Council of the People's Commissars. Its Supreme Soviet is directly elected for a term of four years.⁸ The other local units: provinces, regions, autono-

⁶ Art. 83.

⁷ According to the Webbs, the Council of People's Commissars of the R. S. F. S. R. contained in 1935, 24 members, of whom 9 were U. S. S. R. officials. See S. and B. Webb, *Soviet Communism: A New Civilization?* (New York, 1936), Vol. 1, pp. 92, 93.

⁸ Arts. 89-93.

mous regions, districts, rayons, cities, and rural areas, are each to have a Soviet elected for a two-year term, which in turn chooses the local executive officers.⁹ The new Constitution here does not depart from current law and practice.¹⁰ In general, authority is exercised subject to constant supervision and control from above.

Party Control

Formerly the domination of the Communist Party was assured through the sifting action of the hierarchy of Soviets, which tended to weed out non-members or opponents and to permit only staunch partisans to reach the higher Soviets. Even though the village Soviets might contain a majority of non-Bolsheviks, the All-Russian and All-Union Congresses would be made up exclusively of party members, or party sympathizers who were generally candidates for party membership. Under the new Constitution party control will be assured by control of nominations to the various Soviets and Supreme Soviets. Nominations will be made by the various organizations which are under the domination of the party. There is nothing in the Constitution to guarantee that overt anti-Bolshevik candidacies will be permitted, much less the formation of an anti-Communist political party.

Party control is assured further by the existence of a Union Commissariat of Internal Affairs created by a decree of July 11, 1934. Its functions are "the guarantee of revolutionary order and state security, the protection of socialist property, the registration of civil acts (births, deaths, marriages, di-

⁹ Arts. 94-101.

¹⁰ An idea of the size of the R. S. F. S. R. and the variety of peoples it contains may be obtained by reading Art. 22 of the new Constitution: "The Russian Soviet Federative Socialist Republic consists of: The Azov-Black Sea, the Far Eastern, West Siberian, Krasnoyarsk, North Caucasian provinces, the Voronezh, East Siberian, Gorky, Western, Ivanovo, Kalinin, Kirov, Kuibyshev, Kursk, Leningrad, Moscow, Ormsk, Orenburg, Saratov, Sverdlovsk, Northern, Stalingrad, Celyabinsk, and Yaroslavl regions; the Tatar, Bashkir, Daghestan, Buryat-Mongolian, Kabardino-Balkarian, Kalmyk, Karelian, Koni, Crimean, Mariy, Mordovian, Volga German, North Ossetian, Udmurt, Chechono-Ingush, Chervash and Yakut Autonomous Soviet Socialist Republics; the Adygei, Jewish, Karachai, Oirat, Khakass, and Cherkess autonomous regions."

vances), and the protection of the frontiers."¹¹ This Commissariat took over the work formerly handled by the Ogpu (Department of State Security) with its uniformed and secret police forces. The Ogpu was chiefly renowned as the agency for the repression of counter-revolutionary activities, which it accomplished by means of sudden arrests and secret trials, followed by execution or imprisonment in the terrible camps of Siberia. This combination of police and judicial activity by the same officials and the secret character of the trials stamped the Ogpu as a non-democratic agency. It stemmed directly from the revolutionary and terroristic Tcheka, which in turn was in imitation of the Tsarist Okhrana. There is difference of opinion as to whether or not the autocratic character of the Ogpu has been taken over completely by the new Commissariat.¹² Some of the judicial functions of the Ogpu are being turned over to the ordinary courts, but a "Special Conference" is provided for, as a part of the Commissariat, with power to pass sentences of exile or detention in "corrective labor camps." The new Constitution does not guarantee to the individual citizen the right to a trial in open court, and indicates that the law may provide exceptions to the right of defense.¹³ The Constitution, however, provides that there shall be no arbitrary arrests. A citizen may be arrested only by order of a court "or with the sanction of the State attorney," i.e., the prosecuting official.¹⁴

The Judiciary in the U.S.S.R. and the Union Republics

The general principles which apply to legal systems in democratic countries apply only in part to legal systems in totalitarian states. The democratic assumption is that there are certain rights which are fundamental to the individual and

¹¹ Translation quoted in S. and B. Webb, *op. cit.*, Vol. I, p. 129.

¹² See S. and B. Webb, *op. cit.*, pp. 129-131. Ogpu is a "manufactured" word, from the initials of the organ's title. It is often called gay-pay-oo (G. P. U.).

¹³ Art. III.

¹⁴ That the old Ogpu system is not entirely obsolete despite the new law is evidenced by the fact that following the Kiroff murders in 1936 a special decree set aside the rights of appeal and representation by counsel. Under this decree 117 defendants were secretly tried and executed.

which are to be protected even as against the government, and that there is an abstract justice, never completely achieved, but serving as a mark at which the courts will aim, undeflected by partisan bias. The totalitarian state, on the contrary, assumes that individual rights exist only upon sufferance of the government, and regards the court system as essentially a branch of administration to be employed on occasion for the furtherance of party policies. When matters of no interest to the government are involved the courts may operate much in the manner of democratic tribunals, but in other cases they admit openly that they act to protect the interests of the dominant party or class.

Immediately after the Revolution of 1917, with the disappearance of the Tsarist judiciary there was, for a time, almost a condition of anarchy. The decrees of the Central Congress of Soviets were more propaganda than law. As Trotsky said, they were "the programme of the party uttered in the language of power." In any case there was no machinery for their enforcement save the local Soviets, which enforced them sporadically and with due regard for "revolutionary expediency." Despite the Communist belief that law is not the cause but the product of economic conditions, Lenin was forced to demand a more rationalized legal system in order to carry out his economic and social policies. The demand for a stable legal system was hardly satisfied, however, until 1922 when the U.S.S.R. Constitution was adopted and a civil code set up, based upon a compilation of Imperial Law which had been made in 1913. It is interesting to note that there was no complete break with the past and that the new code contained many rules inherited from the former regime.

Under the original Constitution of the U.S.S.R. there was established a Supreme Court with the following powers:¹⁵

- I. To give the Supreme Courts of the member Republics authentic interpretation on questions of federal (Union) legislation.

¹⁵ Constitution of the U. S. S. R., Art. 43. Taken chiefly from translation by M. H. Andrew, *Twelve Leading Constitutions* (Compton, California, 1931). Under the 1936 Constitution (Art. 105) the members of this court are elected by the Supreme Soviet for a term of five years.

2. To examine, at the request of the Prosecutor of the Supreme Council of the Union of Socialist Soviet Republics, the decrees, decisions, and verdicts of the Supreme Courts of the member Republics, in order to discover any infractions of the laws of the Union, or injury to the interests of the Republics; and if such be discovered, to bring them before the Central Executive Committee of the Union of Socialist Soviet Republics.
3. To render decisions, on the request of the Central Executive Committee of the Union of Socialist Soviet Republics, as to the constitutionality of laws passed by member Republics.
4. To settle legal disputes between the member Republics.
5. To examine accusations brought before it affecting high officers against whom charges have been made relating to their performance of their duties.

The original organization and jurisdiction of this court have been somewhat modified by law. Its plenum, or chief organ, now consists of its president, vice president, three presidents of the sections into which the court is divided, four judges selected by the Presidium of the Central Executive Committee of the Union, the president of the supreme court of each member Republic, and a representative of the secret police, or Ogpu. There are a number of other judges attached to the court.¹⁶

Various matters, some of which have been mentioned already, are referred by the Supreme Court to the Presidium of the Central Executive Committee. On the request of this Committee, the Supreme Court decides as to the constitutionality, not only of laws passed by the member Republics, but also of decrees issued by the Central Executive Committees of these Republics and by various other authorities, including the Council of People's Commissars of the Union.

The Supreme Court of the Union has no special quarters in which to hold all its hearings. "There is no independent federal judiciary, and all cases concerning the Union are tried in the courts of the constituent republics."¹⁷

¹⁶ B. W. Maxwell, *The Soviet State* (Topeka, Kansas, 1934), pp. 146, 147.

¹⁷ *Ibid.*, p. 146.

The Procurator, Prosecutor, or State Attorney of the U.S.S.R., as he is variously styled by different writers, is a very important and powerful officer. He prepares opinions on matters which the Supreme Court must decide; and the court may not render a verdict contrary to his opinion unless it gives a written and reasoned decision. Some of the questions which have been referred from the Supreme Court to the Presidium of the Central Executive Committee were decisions rendered by the court and taken to the Committee by the procurator because he did not agree with them. Under the 1936 Constitution he is appointed by the Supreme Soviet of the U.S.S.R. for a term of seven years and is in complete charge of prosecutions throughout the Union. He appoints, for a term of five years, the State attorneys of Republics, provinces, regions, Autonomous Republics and autonomous regions; and he confirms the appointments of the State attorneys of districts, rayons, and cities. All the members of this hierarchy of prosecutors are responsible only to the State Attorney of the U.S.S.R.¹⁸

The Union of Socialist Soviet Republics does not itself maintain a system of courts below the Supreme Court. Certain types of cases, however, as has been shown above, go from the courts of the member Republics to the Supreme Court. It is also true that the president of the Supreme Court of each member Republic belongs to the plenum of the Supreme Court of the Union. Hence there is a very close relationship between the last-mentioned court and the court systems of the member Republics. Under the new Constitution (Article 104) the Supreme Court has "... supervision of the judicial activity of all judicial organs of the U.S.S.R. and Union republics."

The Supreme Court of the Russian Socialist Federated Soviet Republic was created in 1922. The Judiciary Act of that year defined its general functions as follows:

The Supreme Court of the R.S.F.S.R., through its direct guidance of the entire judicial practice and its unified policy over the entire territory of the R.S.F.S.R., shall be the organ

¹⁸Arts. 113-117.

of supreme judicial supervision over all judicial institutions. It shall likewise be the court of cassation for the superior courts of the autonomous republics, the regional, territorial, provincial and circuit courts, and a court of original jurisdiction in cases, as provided by the law, of special importance to the state.¹⁹

Members of the Supreme Court of the Russian Federated Republic are appointed, according to the 1936 Constitution of the U.S.S.R., by the Supreme Soviet of the R.S.F.S.R. for a term of five years.²⁰ The plenum of the Supreme Court of the Republic has a great deal of power, since its interpretations of law and of particular legal problems must be accepted and applied by all the lower courts in the Russian Republic.²¹

The plenum also possesses the right to approve instructions or regulations which are sent by the presidium of the Supreme Court of the Republic to lower courts. It has final power over acts of the Supreme Court or a division thereof, or of a lower court, which change or annul decisions, sentences, or orders.

The presidium of the Supreme Court of the Republic is a small body consisting of the president of the court, his own deputy, and the presidents of the two grand divisions of the court, cassational and judicial. For certain appropriate questions, agents of the prosecutor and of the Commissariat of Justice meet with the presidium and share in the discussion.

The presidium has important administrative and supervisory powers in respect to the Supreme Court and the lower courts of the Russian Republic, including the courts of the Autonomous Republics and regions. It also prepares bills for such laws as it considers advisable. If the plenum is to pass upon a decision or order of any court, the presidium may express an opinion; and it may even return a case for retrial unless a question of legal principle is involved, when action must be taken by the plenum.

¹⁹ Judiciary Act of 1922, Sec. 8, translated in Judah Zelitch, *Soviet Administration of Criminal Law* (Philadelphia and London, 1931), pp. 73, 74. The authors are much indebted to this study for material hard to find elsewhere.

²⁰ Art. 106.

²¹ Judiciary Act of 1926, note to Sec. 177.

In addition to the plenum and the presidium the Supreme Court has a cassational department which finally reviews cases coming from lower courts; a judicial department which tries certain important cases in first instance; and a disciplinary department which tries members of all courts and other judicial officers for misconduct in office.

The Autonomous Republics are also provided with Supreme Courts elected by the Supreme Soviets of the Republics for a term of five years.

Below the Supreme Courts of the Union Republics are provincial and regional courts, as well as courts of autonomous regions, and district courts. Under the new Constitution,²² the new members of these courts are in each case elected for a term of five years by the corresponding Soviet of workers' deputies.

Like the Supreme Court, the provincial or regional court has a plenum and a presidium. It is separated into civil and criminal divisions, each of which has original and cassational jurisdiction. It also has a disciplinary council. Its cassational jurisdiction covers cases brought up from the People's Courts. Its original jurisdiction extends over many rather serious matters named in the code, ranging from "counter-revolutionary offenses to murder."

The courts of first instance for minor questions are called People's Courts. These courts consist of one regular judge and two temporary associate judges. Certain qualifications, not necessarily judicial, are required of the regular judge; but the associates or "juror judges" may be any persons who possess the franchise. Under the 1936 Constitution (Article 109) the members of these courts are directly elected by the citizens of each rayon for a term of three years.

Cases involving violations of the labor code are tried by special benches of the People's Courts. These special benches consist of one regular judge, one trade union representative, and one person representing the institutions or agencies in charge of public economic matters. Cases in which the facts are very clear are tried by special benches or service chambers.

²² Art. 108.

The Communist Party in the Government

No picture of the constitutional and legal basis of Russia is complete, unless mention is made of certain provisions in the constitution of the Communist Party. This constitution requires that in all congresses, conferences, and elective organs (such as Soviets, trade unions, cooperatives) in which there are at least three members of the party, there shall be organized party units called sections or fractions. These sections must endeavor to strengthen the influence of the party, to extend its influence among non-members, and to bring under party control the institutions and organizations mentioned above. All sections of this kind are completely subordinate to the party organizations.

When elections are to be held in any institution or organization where there is a party section, the section must submit candidates for all the more important positions. These candidates must be approved by the party organization. If it is known that a non-party institution or organization is to bring up certain questions for decision, a general meeting of the section, or the executive bureau of the section, must decide whether these questions involve "matters of principle or matters which require concerted action by Communists." If so, the section or the bureau decides upon the stand to be taken, and the members of the section vote accordingly. If questions of political significance are to be discussed by a section, the discussion must take place in the presence of the appropriate party committee.

In case a section shall find it necessary to carry out a decision through party channels, this must be done by means of the party committee. Action will be taken when authorized in writing by the secretary of the committee and a member of the bureau of the section.

The control commissions of the party may be considered almost as organs of government. These commissions, which are elected by the party congresses, endeavor to bring such influences to bear upon the Soviet organs, that the latter will act to carry out the party program. Control commissions are

elected to correspond with each level of the Soviet structure. The Central Control Commission of the Communist Party in the U.S.S.R. and the Central Control Commission in the Russian Republic are naturally most important.

It is clear that the Communist Party intends to capture, or at least to control, all political, economic, and other institutions and organizations in Russia. Because its power gives it influence even among non-members, the party is very often able to gain its ends in a large group, by means of a small active party section. Hence to a considerable extent the constitution of the Communist Party is in practice a part of the fundamental law of Russia.

Furthermore, Article 126 of the new Constitution of the U.S.S.R. gives the party a definite public-legal position, as follows:

The most active and politically conscious citizens from among the working class and other strata of the toilers are united in the Communist Party of the U.S.S.R., which is the vanguard of the toilers in their struggle to strengthen and develop the socialist system and which represents the leading nucleus of all organizations of the toilers, both social and state (organizations).

It is hardly an exaggeration to say that this Article makes the Communist Party in reality, if not in form, an organ of the state.

B. Italy

The Constitution of Italy is a development of the Constitution granted to Piedmont by its King, Charles Albert, in 1848. It provides for a monarch, a bicameral legislature, and a responsible ministry. Although no formal amendments have been incorporated into the Constitution, law and practice have in fact amended it. For example, ministerial responsibility, which was not defined by the Constitution, during many years developed into responsibility toward Parliament, and particularly toward the Chamber of Deputies. Again, since appointments to the Senate are made by the King on the advice of the

Prime Minister, a recalcitrant Senate has more than once been transformed into a submissive one by the addition of a group of persons loyal to the party in power.

Under Mussolini, Italy still has a King, a "legislature," and a ministry. Some of the external forms of parliamentary government are preserved. But the actual situation is, that Italy is governed by a dictator.

The King

According to the Constitution, the King appoints and dismisses the Prime Minister, who is formally made responsible to the King for the general policy of the government. The other ministers are appointed and dismissed by the King upon the suggestion of the Prime Minister. They are responsible to the King and to the Prime Minister for all acts performed and measures taken by their ministries. The under-secretaries of state are appointed and dismissed by the King upon the suggestion of the Prime Minister, who has reached an agreement with each minister concerned.

The King also signs royal decrees, under conditions specified by law. These rubber-stamp powers, and the various ornamental trappings of royalty, leave the King, as in most constitutional monarchies today, in a position of high rank but with little weight as regards public affairs.

It is true that when Mussolini was making the "March on Rome," the King asserted himself, refused to sign a decree prepared by the Prime Minister establishing martial law, and asked Mussolini to form a Cabinet. There is a considerable difference of opinion, however, as to the King's constitutional right to refuse his signature; and there is a controversy which can never be resolved, as to the probable results of a state of siege under the particular conditions. But there is no doubt whatever that the King's act opened the door to Fascism and ended such beginnings of popular government as Italy had known. Likewise, there is no doubt that the King cannot refuse to sign any official document which Mussolini may present to him, for Mussolini has no intention of being impeded by obstacles of any kind.

The Fascist government has, in certain ways, improved the prestige of the King and the royal family. "The Monarchy," said Mussolini, "is the sacred symbol . . . of the nation." It is at least an interesting, to many persons a somewhat dazzling, focus of attention; and by incorporating it into their general system, the Fascists have gained by its reflected light. They have also avoided the air of tragedy that hangs over many revolutions. And they seem able to govern in such a way that the King will always be useful to them. Thus, the monarchy is useful to the dictatorship by giving the latter an appearance of continuity with Italian history, and also by partially concealing its arbitrary nature. The commission of "Solons" established at the beginning of the Fascist regime to suggest constitutional changes reported that the legislature had distorted the meaning of the Constitution by encroaching upon the royal powers, and advised that this distortion be corrected by a restoration of the authority of the Crown. This meant, in form, that Mussolini as Prime Minister would be responsible to the King and not to Parliament, and, in fact, that he would be irresponsible.

The Cabinet

The Cabinet consists of the "Prime Minister Secretary of State," and the other ministers, who also bear the title of secretary of state. As has been noted, the Prime Minister is appointed and dismissed by the King, and the other ministers are appointed and dismissed by the King upon the advice of the Prime Minister. This is related to the ordinary practice in parliamentary government; but in Italy it has lost its meaning, since the dismissal of Mussolini by the King is inconceivable.

In other important respects the position of the Cabinet, and more particularly of the Prime Minister, is remarkably different in Italy from the position of Cabinets under most constitutional governments. First, the Prime Minister is responsible for the general policy of the government to the King and not to Parliament. The other ministers are likewise responsible to the King; but at the same time they are responsible to the Prime Minister. Second, the Prime Minister is permitted by

law to hold "one or more ministries." It is Mussolini's habit to hold several. Third, even before the Chamber of Deputies was abolished, no bill or motion could be submitted to it without the consent of the Prime Minister. This meant not only that the government could introduce bills, as in all parliamentary countries, but that the Prime Minister was able to prevent any act of the Chamber, even a motion by some member, unless he were pleased with its content and tone. Fourth, Mussolini and his Cabinet have never acknowledged any responsibility toward Parliament.

Next, Mussolini holds special offices and titles of honor, which are made by law attributes of the head of the government. For example, he is Notary of the Crown; he is a member of the Council of Guardians for Persons of the Royal Family; he is secretary of the Supreme Order of the Annunziata. He is protected against insult. Whoever offends the head of the government by words or deeds, may be punished by fine and imprisonment. A special provision of law guards the head of the government against attacks upon "life, safety, or personal freedom," by a penalty of imprisonment for not less than fifteen years for an attempt, and imprisonment for life in case of success.²³

The Cabinet possesses, not formally but actually, powers of legislation. The law provides for the issuing by royal decree of rules having the force of law, in several different categories.²⁴ Thus, decrees may regulate: the execution of laws; the use of powers belonging to the executive; the organization and operation of the state administrative agencies; matters affecting their personnel; the organization of public institutions and concerns—with a list of exceptions including provinces, communes, and universities; and the approval of state contracts. All such decrees are issued after deliberation by the Cabinet and the Council of State (an advisory and administrative judicial body); and the letting of contracts must be preceded by the hearing of expert advisors.

Far more important than these provisions is another which

²³ Law of December 24, 1925.

²⁴ Law of January 31, 1926.

permits royal decrees to issue rules having the force of law, not only within the terms of a statute which delegates definite power to the Cabinet, but also "in exceptional cases, which are urgent or of absolute necessity." For decrees issued under delegated power or for emergency decrees, no advice is required except the deliberation of the Council of Ministers.

Certain rights were reserved for Parliament until quite recently. Thus, the budget had to receive parliamentary authorization. Parliament had power to enact laws regarding the judiciary, the jurisdiction of the courts, the organization of the Council of State, and a few related matters. Emergency decree-laws were to be ratified by Parliament.

If Parliament had controlled the Cabinet, instead of being controlled by it, the provisions just mentioned might have some real importance. Because this has not been the case since Mussolini came into power, for years Parliament went through the motions of criticism, discussion, and enactment, without ever daring to oppose in principle anything favored by "Il Duce." The Cabinet, and above all, the Prime Minister, actually legislate for Italy.

The Senate

The Senate is an appointive body, except that royal princes become members when they reach the age of twenty-one. Appointments to the Senate are made by the King, from a group of categories which includes high public officers, important scientists and authors and eminent persons in general, and payers of direct taxes to the amount of \$600 or more. Senators hold office for life.

The Senate has never been very influential in public affairs, despite its able and distinguished membership. Ministerial responsibility to the Chamber of Deputies, before Mussolini came into power, gave the Chamber a control which the Senate could not equal. Moreover, it has been a common practice of the party in power to ask the King to appoint new members of the Senate who would support the government, if it needed more votes there than it could muster. These "batches" of Senators, as they are called in popular parlance, have overcome

opposition so often that for many years past the Senate has recognized the futility of attempting serious opposition to any measure of importance sponsored by the government.

It must be acknowledged that the Senate has often made valuable changes in bills under consideration. Certain writers go so far as to claim that its powers, even in the realm of the purse-strings, were normally equal (except for the initiative) to those of the Chamber of Deputies. This is an extreme view, however. If the government refused to accept the changes made by the Senate, it was always able to find methods of imposing its own will, even before the days of dictatorship.

All that has been said in the preceding paragraphs regarding the weakness of the Senate was true before Mussolini came into power. It is hardly necessary to say that it is even more true today. When Mussolini addressed Parliament on November 16, 1922, he took pains to say polite words to the Senate, because he intended to use the personal prestige of its members as a bulwark against popular disturbance over his hostile attitude toward the Chamber of Deputies. Knowing that he could control the Senate, he called it "a necessary organ for the just and wise administration of the State."

In 1925 he made his meaning clearer: "The Senate will approve Fascist laws, first of all, because the government has a majority in it; second, because we shall defend this; and third, because the Senate with its lofty sense of patriotism will not desire to assume the responsibility of a dispute which would lead to a crisis of the most serious consequences."²⁵ These words show plainly what Mussolini expects of the Senate; and the history of the last ten years shows that the Senate has met the Duce's expectation.

The Chamber of Deputies

The Chamber of Deputies has recently been abolished by Mussolini. In order to understand what Fascism has done to the Chamber, it is necessary to consider its composition and functions before October, 1922.

²⁵ Quoted in H. W. Schneider, *Making the Fascist State* (New York, 1928), p. 98.

For many years the Deputies were elected in single-member constituencies, of which there were 508 until the World War enlarged Italian territory, and 535 afterward. In 1919 a system of proportional representation was introduced, which brought about alterations in the political complexions of the Chamber. The Socialists "scored a tremendous success"²⁶ and the Popolari, a left Catholic party which had been founded in January, 1919, won 101 seats, in the election of November 16 of the same year. It was unquestionably a reaction of fear lest these victories in the Left might mean Communism, that opened the way for Fascism a little later.

The franchise had been extended many times. Until 1882 it had been confined to freeholders and large taxpayers. In 1882 it was extended to adult males who could read and write. A further extension in 1912 gave votes to all men past thirty years of age. In 1919 all men who had seen military service were made electors. The result of all these changes approximated universal manhood suffrage.

Mussolini's first address to the Parliamentary Chambers included a series of studied insults and open threats to the Chamber of Deputies. He actually said:

"I am here to defend and enforce to the fullest extent the revolution of the Black Shirts. . . . With three thousand youths fully armed, fully determined, and almost mystically ready to act upon any command of mine, I could have . . . made of this dingy gray assembly hall a bivouac for my squadrons; I could have kicked out Parliament and established a government exclusively of Fascists. I could have done so; but I did not wish to—at least not for the present. . . . As far as possible I do not desire to govern against the Chamber; but the Chamber must feel its particular situation, which makes it liable to dissolution—in two days—or in two years—. . ."²⁷

This bullying was resented in many quarters, but the Chamber made no real attempt to resist Mussolini, then or later.

²⁶ H. Finer, *Mussolini's Italy* (New York, 1935), p. 121.

²⁷ Address to Parliament on November 16, 1922, reported by all leading newspapers of the world and printed in the *Gazzetta Ufficiale*. A portion of this address, translated into English, can be found in Schneider, *op. cit.*, pp. 302ff.

The Socialist bloc, it is true, refused to make the surrender unanimous; but the Socialist bloc soon lost its power.

In 1923 Mussolini's able supporter Acerbo secured the passage of a law designed to give the Fascists a clear majority in the next election for the Chamber of Deputies. Its most important provision was, that the party whose total vote throughout the country was highest, if that vote amounted to 25 per cent of the ballots cast, should receive two-thirds of all seats in the Chamber. The other one-third of the seats should be divided among the various parties on the basis of proportional representation. If no party should obtain 25 per cent of votes, all seats should be distributed in proportion to the votes cast for each party. The only election held under this scheme, in April, 1924, gave the Fascists and their friends who were included on the "great list" a total of 357 seats, while all other parties together obtained 178 seats, of which 17 were really Fascist in sympathy.

Although this majority was easily sufficient for the passing of all bills introduced by the Fascist government, the fact of opposition displeased Mussolini. Two Socialist leaders, Amendola and Matteotti, made powerful speeches against the policies of the government. Matteotti denounced the use of armed force, the "strong-arm methods," and the frauds, which had influenced the result of the election. Within a few days, Matteotti had been kidnapped and murdered. Mussolini disclaimed any knowledge of this tragedy, and punished various Fascists who were thought to be responsible for it. But during the last six months of 1924 he was unable to prevent a rising tide of opposition.

Soon after the murder of Matteotti, most of the non-Fascist deputies withdrew from the Chamber and set up an opposing group in headquarters on the Aventine Hill. They were able to work against Fascism for nearly a year and a half before they were finally crushed. Meanwhile, the remnant of the Chamber passed any laws that Mussolini desired, although a certain amount of disagreement occasionally developed even here, in the ranks of the non-Fascists who had been elected on the Fascist list.

From 1925 on, Mussolini became more and more intolerant of opposition and criticism. He wished to bring about a new organization of the Chamber of Deputies, in keeping with his "desire to realize hundred-per-cent Fascism, to enable the executive to rid itself of doctrinaire politics, of demagoguery, indeed of all 'electionism' and political opposition. The executive should be definitely freed from the control of Parliament, provided with an instrument for mere consultation; but this body should definitely bring the trade unions and employers' syndicates into the state machinery. Under the Fascist party's guidance they should assume responsibility for government and not be allowed to criticize it from outside."²⁸

After a great deal of consideration and discussion, the Fascist Grand Council agreed upon a system which became law in 1928. The opposition to this system, in both the Senate and the Chamber of Deputies, was based largely upon the fact that it was a complete departure from the Constitution. The bill was passed, however, by an overwhelming majority.

According to its provisions, the Chamber of Deputies consisted of 400 members elected as a single list. The Grand Council of Fascism prepared the list, largely from names proposed by the national confederations of legally recognized syndicates, and names proposed by legally recognized "moral entities," and *de facto* associations of national importance, devoted to culture, education, assistance, or propaganda. The confederations of syndicates proposed 800 names, and the other bodies proposed 200 names. The Grand Council, in selecting the 400 candidates, might go outside the proposed names if necessary, in order to include persons who have achieved fame in the sciences, letters, arts, politics, or military service, and who had not been placed upon the original lists.

The 400 selected names were published in the *Official Gazette* and posted in all communes. On the third Sunday following publication the elections were held, on the question: "Do you approve the list of Deputies nominated by the Grand Council of Fascism?" Under this question the electors were to vote Yes or No. Provision was made for the nomination of

²⁸ H. R. Spencer, *op. cit.*, p. 173.

other lists in case the one submitted were rejected. Of course rejection was politically impossible.

Voters were defined by the electoral law as male citizens past twenty-one years of age, or eighteen years of age if married or widowers with children, who fall into one of the following groups: (1) Payers of dues to a Fascist association of workers or employers; (2) payers of direct taxes to the amount of 100 *lire*, or recipients of an income of 500 *lire* or more from government bonds; (3) salaried (or pensioned) officers or employees of the state, province, or commune, and (4) members of the Catholic clergy, or ministers of any religion, the practice of which is permitted in Italy.

Since the electoral law of 1928 was passed, there have been two elections of the Chamber of Deputies: one in March, 1929, and one in March, 1934. Official figures show that the affirmative votes in the 1929 election were more than eight and one-half millions, against 135,773 negative votes; and that the affirmative votes in the 1934 election were more than ten millions, against a handful of 15,275 negative votes. In both cases, all sorts of advertising and "electioneering" methods were used by Fascists; whereas no opposing party, and in fact no opposition of any kind, could use public means of impressing popular opinion.

On March 23, 1936, Mussolini announced at a general meeting of the twenty-two corporations that the Chamber of Deputies would be suppressed at once.²⁰ This action came after many previous statements indicating that the dictator was only awaiting the completion of the corporate system in order to transfer the rather vague functions of the Chamber to a new body representing various economic activities rather than the nation as a whole. This substitute organ is to be the National Assembly of Corporations, renamed the Chamber of Fasces and Corporations. Its membership will be drawn from the twenty-two corporations in a manner to be determined by the Fascist Grand Council. Its functions, which one may presume will be advisory only, will also be determined by the Grand Council.

²⁰ See dispatch by Arnaldo Cortesi, *New York Times*, March 24, 1936.

The Corporative State

The recent composition of the Chamber of Deputies, as we have seen, represented principally the interests of "national confederations of legally recognized syndicates." These syndicates have passed through many phases, in the development of what Mussolini likes to call The Corporative State. From 1926 to 1934, law after law made important changes in the status of the syndicates. In 1934 all important groups of employers and employees, syndicates, federations, and associations, were organized into twenty-two corporations. Other corporations may be organized by decree.

Each corporation has a council, which consists of equal numbers of delegates from employers' associations and delegates from workers' associations. The president of the council is appointed and removed by a decree of the Minister of Corporations (who has been Mussolini, with only a short intermission, since 1926). Among the powers of the council are:³⁰

1. To conciliate disputes that may arise among the affiliated organizations, and to issue certain rules.
2. To promote, encourage, and subsidize all attempts to coordinate and improve production.
3. To set up labor exchanges wherever the need for them is felt. Where such exchanges are established, the carrying on of other offices of the kind may be prohibited by decree.
4. To regulate apprenticeship by issuing general compulsory rules affecting this matter, and to supervise the observation thereof. Such rules are subject to all the provisions of collective labor contracts.

The various syndical bodies and other associations and organizations which compose the corporations send representatives to a central body called the National Council of Corporations. The law provides that the Prime Minister shall be the president of the National Council of Corporations and of all its component organs. By this simple provision, Mussolini obtains a high degree of control.

³⁰ Decree of July 1, 1926, Art. 44.

The National Council of Corporations has the following organs: Sections and Sub-Sections; Permanent Special Committees; General Assembly; Central Corporative Committee. The sections are as follows: Liberal Professions and Arts; Industry and Artisans; Agriculture; Commerce; Land Transport and Inland Navigation; Sea and Air Transport; Banking. The sections and sub-sections decide (for advisory purposes) questions in their fields of interest. The permanent special committees are established by decree of the Head of the Government upon the proposal of the Minister for Corporations. Their duty is to consider individual subjects of a general character and a largely technical nature, within the limits of competence set by decrees.

The general assembly of the National Council of Corporations hears reports, may discuss questions that have already been handled by the sections and permanent special committees, and gives official opinions and advice on many subjects. Among these subjects are: The application and integration of the principles contained in the Labor Charter (to be explained later) according to the developments of the Corporative system and the requirements of national production; legislative bills and rules affecting regulation of production and labor; the relations among syndical associations and the like, and corporative organs and institutions; and questions relating to the syndical organization of the various professional categories. It must be consulted in regard to some of the matters listed in the law; and it may be asked to give an opinion on any matter whatever, related to national production. The opinions upon obligatory questions must always be given by the general assembly.

The Central Corporative Committee is composed of the Ministers for Corporations, the Interior, and Agriculture and Forests; the Secretary of the National Fascist Party; the Under-secretaries of State for Corporations; the Presidents of the national confederations of employers and workers and of artists and members of professions; the President of the National Institution for Social Assistance; and the Secretary General of the National Council of Corporations. The work

of this committee is: To coordinate the activities of the Council; to replace it between sessions, except for reserved matters; and to give its opinion on questions "reflecting the political orientation of the syndical activity with regard to the national problems of production and to the moral aims of the corporative organization."⁸¹

Provincial Councils of Corporative Economy and Provincial Offices of Corporative Economy are formed along lines somewhat resembling the pattern of the National Council of Corporations. They also give advice, provide data, and consider questions within their sphere of authority.

The Labor Charter, which was promulgated by the Grand Council of Fascism in April, 1927, purports to set forth the principles of governing the Corporative State. It declares work to be a social duty, and defines the object of production as "the welfare of individuals and the development of national power." It provides for collective labor contracts, and for labor courts to settle controversies. The declaration is made that the Corporative State considers private enterprise in the sphere of production as "the most effective and useful instrument in the interest of the nation." Recent declarations by Mussolini make it clear that he intends to have the State control or take over enterprises of basic importance, especially in relation to the possibility of war.

The Judicial System

At the head of the Italian judicial system stands the Court of Cassation at Rome. Before the Fascists came into power, Italy had possessed five regional Courts of Cassation, no one of which was the supreme judicial organ of the state. This meant that the judicial system lacked unity and consistency. On occasion, the legislature made various grants of special jurisdiction to the Court of Cassation at Rome, which thus became, as it were, *primus inter pares*. This confused and altogether undesirable situation was ended under Fascism by the transfer of all cassational jurisdiction to the court at Rome, and the abolition of the other Courts of Cassation.

⁸¹ Law of March 20, 1930, affecting the National Council of Corporations.

Immediately below the supreme court are sixteen distinct Courts of Appeals, which receive cases coming up from the tribunals of first instance. Below these tribunals are nearly a thousand local courts. Very minor matters are handled by the praetor, or justice of the peace. It is hardly necessary to say that the personnel of the courts is overwhelmingly Fascist.

Three important changes made under Fascism are: the abolition of the jury; the restoration of the death penalty (which had not been a part of the Criminal Code for nearly twenty years); and the inclusion of judges in a law of 1925 which gave Mussolini a practically absolute power to dismiss persons from the public service for political reasons.

An administrative court system, similar in its organization to that of France, has existed in Italy for many years. At the head of this system, Section Four of the Council of State has possessed appellate jurisdiction. In 1924 this section was combined with Section Three, "in order to give administrative jurisdiction the efficiency which it lacked and also to give a greater simplification, acceleration and economy to its judgments."²² In other words, the tradition which Section Four had long been endeavoring to build up, of a tribunal which would do justice even where acts of administrative officers were concerned, was so directly opposed to the Fascist viewpoint that a way was found of impairing the independence of the section.

The lower administrative court is the prefectural council or provincial giunta. Under the present regime this means that considerations of Fascist policy rather than those of abstract justice will control its decisions.

In connection with the militia which was formed out of the various Fascist groups that had helped Mussolini to obtain power, there is a Special Tribunal or military court, which tries not only cases of discipline in the organization, but also certain cases in which citizens are accused of anti-Fascist activities. Such persons are deprived of the safeguards that belong to the

²² Benito Mussolini, *La Nuova Politica dell' Italia* (Milan, 1923, 1924, 1926), Vol. II, p. 175, translated in H. W. Schneider, *Making the Fascist State* (New York, 1928), p. 99.

regular procedure of trial in an open court, and are subject to whatever treatment the military authorities, acting under the orders of their leader, may choose to impose.

In November, 1936, it was announced that the entire system of civil and criminal courts would be abolished, to be replaced by a series of "boards or committees from various divisions of the corporate State."³³ Civil cases involving contracts, for instance, would be handled by a committee of the corporation appropriate to the subject matter of the case. Criminal cases would be handled by committees appointed by the Ministry of the Interior. Lawyers would become civil servants, given a salary by the state, and presumably assigned to clients by the "court."

C. Germany

The Weimar Constitution of the German Republic, adopted in 1919, is still the formal basis of government. However, so many laws whose effect is to amend the Constitution have been passed since Hitler came into power, that the system of government established by the Constitution has been transformed almost beyond recognition.

The Republic

The structure of government adopted by the Republic was as follows: The German Commonwealth, or Reich, was a federation of German States. Each State was required to have a republican constitution. A long list of powers belonged to the Reich, and provision was made for a judicial review of court decisions in case any provision of State law appeared incompatible with national law.

Legislative power belonged to the Reichstag, or popular House. Deputies were elected by universal, equal, direct and secret suffrage of all men and women past twenty years of age. Seats were distributed among the political parties on the principle of proportional representation. A Reichsrat, or council representing the States, had advisory and consultative

³³ Quoted from A. P. dispatch in *New York Times*, November 14, 1936.

powers, including the right to have bills which it favored introduced into the Reichstag, and the right to have measures passed by the Reichstag reconsidered. Under certain conditions, laws were initiated by the people or referred to them.

The President of the Reich was elected by the people for a term of seven years, with no limitation as to re-election. He was invested with the usual powers of the executive. All his orders and decrees were to be signed by the Chancellor or the appropriate minister, who assumed responsibility for them. An important power, which has played a significant part in both the Republic and the Third Reich, was given to the President by the famous Article 48. This Article reads in part as follows:

When public safety and order are seriously disturbed or endangered within the Reich, the President of the Reich may take the measures required to restore them, including if necessary intervention by armed forces. For this purpose he may temporarily abrogate either in whole or in part the fundamental rights [of personal liberty, domestic sanctuary, secrecy of correspondence, freedom of speech and of the press, freedom of assembly and of association and organization, guarantee of property].

The President of the Reich shall immediately inform the Reichstag of any measures taken in accordance with paragraphs 1 or 2 of this Article. Such measures shall be abrogated at the demand of the Reichstag.

The government, or Cabinet, was to consist of a Prime Minister with the title of Chancellor, and of ministers selected by him. The President appointed all members of the Cabinet. Both the Chancellor and the individual ministers were responsible to the Reichstag.

Judges were declared to be independent, and subject only to the law. Ordinary jurisdiction was exercised by the Reichsgericht or national court, and the courts of the States. Extraordinary courts were prohibited. "No person may be taken from his legal judge," that is, be tried by some tribunal established for political or other purposes not recognized by the laws which were enforced by the judicial system.

Many rights of citizens were guaranteed by the Constitution. In addition to those which might be suspended under Article 48, may be mentioned: Full liberty of faith and conscience for all inhabitants of the Reich; the enjoyment of civil and political rights and admission to official positions, without reference to religious connections; and equality before the law.

A National Economic Council was to be formed, to give preliminary advice on matters of social and economic legislation which the Cabinet was preparing to bring before the Reichstag. Bills desired by the Economic Council must be introduced into the Reichstag by the Cabinet, even though they might be contrary to its own views. The right to bring about the "socialization" of suitable economic enterprises, and a good deal of control over industry, were given to the Reich.

The Constitution might be amended by a majority of popular votes in case of a plebiscite; or by the legislative process, provided that two-thirds of the members of the Reichstag were present and two-thirds of those present voted for the change.

The Third Reich

Germany is no longer a federation of States. A law on the Reconstruction of the Reich, which was passed on January 30, 1934, gave Germany a unified rather than a federated system of government, by abolishing State legislatures, transferring to the Reich the sovereign rights of the States, and placing the State Cabinets under the control of the national Cabinet. Previous laws had already made important changes in the State government, by giving each State a national governor appointed by the President of the Reich upon the request of the national Chancellor, and bestowing wide powers upon this officer.

The same results were obtained in Prussia as elsewhere, by a somewhat different arrangement. The Chancellor of the Reich exercises the powers of national governor of Prussia. He is assisted by "presidents" in charge of administrative districts or provinces.

The national governors act under the general supervision of the Minister of the Interior. Other ministers, however, may give them instructions regarding specialized departmental functions.

Under the Third Reich, legislative power is exercised chiefly by the Cabinet. By an enabling act called a Law to Combat the National Crisis, dated March 24, 1933, the Reichstag bestowed upon the Cabinet for a period ending on April 1, 1937, the power to enact national laws. These laws might deviate from the Constitution, but they must not affect the position of the Reichstag and the Reichsrat. The powers of the President were also to remain undisturbed.

Even these limitations were removed by a "rider" in the law on the Reconstruction of the Reich, which was the last act passed by the legislature in the manner prescribed by the Constitution. Power to make new constitutional law was thereby given to the national Cabinet, without any limitations whatsoever. From the time that it passed this law, to the present day, the Reichstag has had no further share in legislation. Hitler and his Cabinet have been the only lawgivers of Germany.

The Reichsrat has been abolished, as a natural consequence of changing the federated States from sovereign entities into administrative divisions of the Reich. All provisions of the Weimar Constitution which referred to the Reichsrat are, therefore, inapplicable. Such functions, formerly belonging to the Reichsrat, as the representation of the States in affairs of the Reich, and participation in legislation and administration, no longer exist. Any special duties with which the Reichsrat was charged are now performed by the appropriate ministry.

The Reichstag, or, more accurately, a body called the Reichstag, is still to be found in Germany. "As the national minister Dr. Frick told a representative of the press, the Reichstag remains in existence according to the will of the *Führer* and National Chancellor, because it is a forum before which the *Führer* and National Chancellor can place important and fateful questions of foreign and domestic policy for dis-

cussion and decision, when he does not submit them directly to the people in a plebiscite."³⁴ Since the Reichstag is composed entirely of members of the National Socialist Party, there is little danger that it will introduce measures, and perhaps pass them, without the permission of the Cabinet. Anyone who attempted such a thing would be dismissed from the party, and thus lose the right to membership in the Reichstag.³⁵ It is indeed a "shadow Parliament" which represents only the group in power.

The changes described above have been made with bewildering rapidity. Yet a few persons in Germany may still remember that when Hitler addressed the Reichstag on March 23, 1933, and requested the passage of the Enabling Act, he said:

"The government will use these powers only in so far as they are essential to carry out vitally needed measures. Neither the existence of the Reichstag nor that of the Reichsrat is threatened. The position and the powers of the President of the Reich remain untouched. . . . The separate existence of the states will not be abolished. The rights of the religious organizations will not be lessened, and their relationship to the State will not be altered. The number of instances where it is essential to apply such a law is naturally limited."³⁶

The people are still a factor in the making of law, if and when the *Führer* decides to consult them. The provisions for initiative and referendum found in the Weimar Constitution are no longer applicable. There is no doubt that any attempt to circulate a petition to initiate a law would be considered an endeavor to form a new political party, and would be penalized accordingly.

A law providing for plebiscites was passed on July 14, 1933. It empowers the National Cabinet to ask the people whether or not they agree to a measure proposed by the Cabinet. The measure may be a law. A simple majority of valid votes cast is decisive in all instances, even though a constitutional amend-

³⁴ Otto Meissner and Georg Kaisenberg, *Staats- und Verwaltungsrecht im Dritten Reich*, p. 87.

³⁵ Law of July 3, 1934, *Reichsgesetzblatt*, Pt. I, p. 530.

³⁶ *Reichsgesetzblatt*, Pt. I, March 24, 1933.

ment may be in question. No provision is made regarding Cabinet action in case of a negative vote.

Two important measures have been submitted to popular vote under this law. The question of Germany's withdrawal from the League of Nations was decided by a plebiscite held on November 12, 1933. The official report showed a percentage of 93.1 in favor of withdrawal.

The second plebiscite was in effect a vote of confidence in Hitler. As President von Hindenburg lay on his death bed, the Cabinet enacted a law uniting the office of President of the Reich with that of Chancellor of the Reich, and providing that the powers and functions of the Presidency should devolve upon "the *Führer* and Chancellor of the Reich, Adolf Hitler." The law was to take effect from the time of von Hindenburg's death.

Hitler at once declared that he would not use the title of President, and asked that a plebiscite be held in order that the law combining the two important offices might receive "the express sanction of the German people." On August 19, 1934, the people voted for the change, by a majority of 89.9 per cent.

It is plainly to be seen that under the present system all law emanates from the Cabinet. The Cabinet itself makes nearly all the laws that are passed. However, if Hitler desires the appearance of parliamentary procedure, or the weight of popular support, in respect to any measure, he may introduce it into the Reichstag or submit it to a plebiscite. It is thus possible to speak of the legislative power as being shared; but so long as the Reichstag consists wholly of Hitler's partisan supporters, and the people are overawed by Storm Troops and Shock Troops and the very recent memory of terror, it is more accurate to say that the Cabinet is the legislative organ of Germany under the Third Reich.

There is no general guarantee of the rights of citizens in Germany today. It is true that these rights are still guaranteed by the Constitution; but Article 48 has been used as a basis for limiting them; and some of them have been robbed of all meaning by the laws and institutions of the Hitler regime. Thus, in theory every German possesses the right of free

thought and free speech. What does this mean in practice, under a dictatorship that makes all political parties illegal except its own? No personal right, and no civic right, is safe in the present regime.

A reconstructed Economic Council exists under Hitler; also local economic chambers and a National Economic Chamber. The Council of the National Economic Chamber serves as an advisory organ to the national Ministry of Economics. No political powers are given to these and similar organizations. However, their views will certainly receive official consideration; and the organized groups are useful to the government as avenues of control.

The Judicial System

The courts of Germany comprise three classes, namely: the ordinary judicial courts, administrative courts, and special courts. The ordinary judicial courts, named in order from highest to lowest, are: the National Supreme Court (*Reichsgericht*), the superior state courts, the state courts, and the local courts. The jurisdiction of the ordinary courts is still general, including: "All civil and criminal cases, for which neither the jurisdiction of administrative authorities nor that of administrative courts is provided, nor special courts are legally established or permitted."³⁷

There have been a number of changes in the organization of the courts, during the past few years.³⁸ All courts, for example, administer justice in the name of the Reich and as members of a unified national system,³⁹ although such old names as local courts and state courts are retained. There have also been changes in jurisdiction, since much of the former jurisdiction of the regular courts is now given to special courts.

In the local courts, for civil cases, there is one judge; the other courts have chambers of three (in the case of the *Reichsgericht*, five judges). For criminal cases, the local courts con-

³⁷ *Gerichtsverfassungsgesetz* (Law on the Organization of the Courts), Art. 13.

³⁸ See especially law of February 16, 1934, *Reichsgesetzblatt*, Teil I, p. 91, and law of March 20, 1935, *Reichsgesetzblatt*, Teil I, p. 403.

³⁹ Law of February 16, 1934, *Reichsgesetzblatt*, Teil I, p. 91.

sist of one judge, or one judge and lay associates. The state courts have "small" criminal chambers with one judge and two lay associates, and "large" criminal chambers of three judges with two lay associates. They also sit for jury trials at fixed periods; the bench then consists of three judges, who are assisted by six jurors. The higher state courts have "criminal senates" of three judges, or five in cases of first instance. The Reichsgericht always has a bench of five judges for criminal cases.

The administrative courts of the States, which have long been a feature of the German judicial system, have been somewhat changed in character. It was formerly their duty to decide cases brought before them on the ground that administrative officers or agents had in some way injured the rights of an individual while seeking to enforce the law. A considerable degree of protection was thus given to the individual against wrongful acts of the administration. Now the attitude of the administrative courts is perforce altered to a certain extent. "Against political leadership and accomplishment, no possible rights of individuals can be of controlling significance. Even the administrative court system . . . as regards this political leadership, is not independent in the earlier sense of the word. The administrative judicial control does away with the faults of law and hence of execution in the acts of the subordinate authorities, and guarantees in the common interest of state and citizen the unconditional and complete observance of the legally prescribed commands of the Führer."⁴⁰

A number of special courts have been established or developed under the National Socialist regime. The most important of these have jurisdiction over cases in which persons are charged with some offense against the welfare of the Reich, or the dignity of the National Cabinet, or that of the National German Socialist Workers' Party or of its members, and so on. No appeal or other legal remedy is available against the decisions of these courts. An example of these special courts is the People's Court (Volksgerichtshof), which tries cases of

⁴⁰ Otto Meissner und Georg Kaisenberg, *Staats- und Verwaltungsrecht im Dritten Reich* (Berlin, 1935), p. 139.

high treason and treachery.⁴¹ This court carries on its work through senates which include both professional and honorary members.⁴²

D. Comparison of the Totalitarian States

The totalitarian states differ from one another in external form. Italy has a King. Germany has a Chancellor whose office is combined with that of President. Russia has a committee, or Presidium, which possesses executive power. Its chairman performs the personal functions of Chief of State when necessary. Italy has a Senate and a Chamber of Corporations, which resemble a bicameral legislature possessing merely consultative powers. Germany has a unicameral legislature which is seldom allowed to meet, and then only for the purpose of ratifying decisions already made by Hitler. Russia has a bicameral legislature with true legislative powers. Italy and Germany encourage private ownership of capital, although in return they expect capitalists to be amenable to the controls undertaken by the state. Russia seeks to make capital, so far as this can be done, the common possession of the people through state ownership.

The resemblances among these states are even more striking than the differences. In each of them, one man has power and influence which justify the world at large in calling him a dictator. "Il Duce," "der Führer," and the leading figure in the Communist Party, Stalin, exercise respectively more personal power than is possessed by any other Chief of State in the modern world. Again, in each of the totalitarian states, one political party, and only one, is permitted to exist. This party is given powers and privileges. The most important man in the state is also the chief of the party. The state openly recognizes

⁴¹ *Reichsgesetzblatt*, 1934, Teil I, Art. III, pp. 341 ff. Among the acts which this law defines as high treason are: Attempts to deliver the Reich in whole or in part to a foreign state; attempts to deprive the National President or the National Chancellor or any other member of the national government of his constitutional power, or to hinder him from exercising his constitutional power in whole or in part. The penalties provided range from imprisonment to death.

⁴² *Reichsgesetzblatt*, 1936, Teil I, p. 398.

the influence of the party and encourages its activities. No high office is open to any but party members. Attempts to form other parties, and even opposition to the party in power, are crimes for which severe penalties are provided.

Personal rights, as these are generally understood in democratic countries, are either non-existent or meaningless in totalitarian states. Freedom of speech and the press, although the new Constitution of Russia may guarantee them, cannot be exercised in that country. Any similar guarantees that formerly existed (and still exist on the statute books) in Italy and Germany have no practical application today. How can there be freedom of speech or freedom of the press where it is forbidden to say or to publish anything opposed to the policy of the one favored political party—or where, as in Italy and Germany, the sacrosanct Leader must not be offended or insulted? Personal freedom is non-existent in the totalitarian states, for the spy system and the secret police system in all of them are operated in such a way as to destroy individual liberty whenever that liberty is used, or is suspected of being used, to oppose the policy or the personnel of those in power. It is known that in all these states many persons are penalized and even executed without trial by a regular court.

The totalitarian states are alike in seeking to establish economic self-sufficiency. At the same time that they talk of idealism and condemn the excessive interest in material things that is displayed, as they insist, by the world in general and America in particular, all the totalitarian governments devote powerful efforts to bringing about an economic development of such a nature and such proportions as to make each of them independent in case of war.

War is the expectation of the leaders in all the totalitarian states. The people in each one are taught that most nations of the world are their enemies, that all talk of international good will which is not naïve is hypocritical, that war will inevitably come, and that every citizen must therefore be ready to defend his country. In Italy and Germany many voices actually praise war as an arena for the display of the heroic virtues.

In organization, then, the three leading totalitarian states

display a number of differences. In aim, they are different as regards the relation of the government to capital, and alike as regards economic self-sufficiency and preparedness for war. In method, the suppression of personal liberties, the establishment of one orthodox political faith and the persecution of heretics, and the use of secret police, spies, and punishments without due process of law, they resemble one another very closely.

CHAPTER XVII

SUMMARY AND CONCLUSIONS

The most important political and social phenomenon of the present age is the struggle between the democratic state and the totalitarian state. Upon the outcome of this struggle will depend, not merely the external forms of government, but also, to a considerable extent, the basic assumptions, the habits of thought, the economic institutions, the scientific developments, the social, educational, religious, and aesthetic trends, the entire cultural pattern of the immediate future. For this reason it is imperative that the philosophical or theoretical basis, the necessary conditions, and the effects of democracy and of totalitarianism, shall be generally understood. It is only through such comprehension that individuals or groups can make an intelligent choice between the two systems, or, if choice be merely an academic question for the moment, can find courage for the endeavor to keep alive the concepts of the preferred system, to spread them, and to work toward their eventual victory.

Democratic philosophy and democratic government, in both past and present forms, are based upon a conception of the importance of the individual, and the inherent political equality of one individual with another. The government is the creation of the people, derives its authority and powers from them, and may be altered or destroyed by them. The individual has certain natural rights with which the state must not interfere; to secure these, a bill of rights or some similar legal restriction upon the government is desirable. In the exceptional cases where such rights must be invaded (as when the land of the individual is taken from him in order that a public highway be built upon it) this can be done only for a recognized public purpose, and by means of well-established legal processes which include appropriate safeguards for the individual, such as the

payment to him of just compensation for his expropriated land, protection against unreasonable searches and seizures and cruel and unreasonable punishments, the right to a speedy and public trial, and the right to trial by jury.

Other important rights of individuals which are generally recognized and guaranteed in democratic states include freedom in the practice of religion, freedom of speech, freedom of the press, freedom of assembly, freedom of political affiliation, freedom in choice of domicile, freedom to change citizenship, and freedom to become a candidate for any public office, subject to the qualifications prescribed by law for such office. Individuals are guaranteed equal protection of the laws. There has been a strong tendency in democratic states to abolish legal privileges and disadvantages based on race, color, social status, family, primogeniture, and sex.

Since the government depends for its form and its very existence upon the will of the people, and operates for the welfare of the people,¹ its actions must be controlled by the people in order that their welfare be assured and their will be made effective. In the various democratic states, various methods of realizing popular control have been adopted. The right to vote for representatives of the people in the legislature is universally found in these states. The qualifications for voting have become less and less rigid, and there is a growing tendency to include in the electorate every responsible individual of adult age. In some democratic states experiments in popular control have included the right to vote for executive, administrative, and judicial officers, the right to recall officers by the use of the franchise, and the right to initiate legislation and to have laws referred to the electorate under certain conditions.

The conception of the importance and the equality of individuals naturally leads to the institution of majority rule. If all men are equal in the political realm, then the will of the people must be the will of the most people. However, the democratic philosophy, because of the rights and liberties for which it stands, demands not alone that the minority shall

¹ The Preamble to the Constitution of the United States is an excellent statement of this position.

submit to the will of the majority. It demands also that the minority shall share in all general social advantages which may be brought about by the operations of the very policies to which it is opposed, and—an even more important matter—that the minority may openly exercise the rights of free speech, free press, free association, and the like, retain every political right and privilege, use every means of persuading persons to adopt its doctrines, and consequently at some election find itself no longer the minority, but the majority.

Representative government was always a necessary part of democratic doctrine. It would be impossible for the people to vote directly on every public question. Their directly elected representatives, voting in the legislature, must be trusted to express their will. If the representatives should fail in this task, the next election would correct matters.

The development of opposing political parties is an inevitable concomitant of institutions based on this philosophy. Although earlier advocates of democracy felt that the rise of parties must be checked if possible because "factions" might deadlock the operations of government or even lead to civil war, contemporary thinkers acknowledge that parties have a logical place in democratic states. The value of party organization in the development and promotion of public policy, and the special value of strong partisan opposition in order that new policies may be developed and promoted and that the government in power may be subjected to constant criticism openly expressed, are generally recognized even by those advocates of democracy who see most clearly the weaknesses of the party system.

In a democracy, the executive authority must in some sense be responsible to the people. This may be accomplished, as in the United States, by having the chief executive elected for a short term of office by electors chosen by popular vote and pledged to cast their ballots for certain candidates.² It may be accomplished, as in France and England, by lodging the

² Although the Constitution permits the method of choosing electors in each State to be decided by the legislature, the operation of democratic institutions has resulted in popular choice of electors in every State.

executive authority nominally in the chief of state but actually in a prime minister who can retain his office only so long as the directly elected representative of the people support him. It may be accomplished, as in certain member states in the United States, by the possibility of popular recall.

Democratic philosophy visualizes the position of not only the chief executive, but all public officers, as limited in still other ways. The first of these is the principle that no act may be performed by the chief executive (or by any executive or administrative officer) except by virtue of law. The constitution, the statutes, or rules and regulations based upon these, must provide a basis for all executive and administrative action. In other words, the chief executive and all members of the administration are subject to law. In England and the United States this principle is known as the supremacy of the law. When Germany enjoyed a certain degree of democracy before the World War, and during the period of the Republic, the same concept was called the *Rechtsstaat* or the state ruled by law. In France this principle has been embodied in the administrative law by which the legality of any executive or administrative act may be controlled.

A corollary of this principle is the right of the individual to contest the legal validity of executive and administrative acts before the courts, regular or administrative, according to circumstances. The individual may claim that the governmental authority or agency has acted in excess of power, abused its powers, violated constitutional rights, misinterpreted a statute, or in other ways has acted contrary to law. In some jurisdictions the courts are specifically vested with power to execute their decisions in such cases; in others, they may not undertake enforcement proceedings against the executive and administrative agencies, but the latter habitually respect the opinions and findings of the courts. Every democratic state establishes more or less complete methods of subjecting the administration to the law.

Another important democratic principle is that the powers of government should be so divided among various agents and agencies, and so organized to check and balance one another,

that a dangerous concentration of power, opening the way to tyranny, will not be possible. The generally accepted classification of governmental powers sets up three categories: legislative, executive and judicial. Appropriate agents and agencies must be established for the exercise of each kind of power. No agency shall exercise (except in a minor and incidental way) the powers belonging to agencies in other categories. Consequently, no single person or group in the government can make the law, execute it, and decide cases arising under it. This will prevent the persecution of individuals and groups by special laws, zealously enforced, with severe penalties for infractions, all representing the views of a single man or a small cabal. The principle of separation of powers is clearly useful in preserving democratic institutions.

Totalitarian philosophy and totalitarian government are based upon a diametrically opposite view of the relations between the individual and the state. It is true that Russia sees, philosophically, a society in which the state will not exist; but actually the place of the individual in the U.S.S.R. is very similar to the place of the individual in Italy and Germany.

In the Fascist countries, there is not even a theoretical recognition of the individual as the nucleus of society and the foundation of the state. Here the state, as the active political organ of the nation, is made the object of an almost religious veneration. There are no natural rights of individuals which should be respected by the state. Any rights which individuals possess are given to them by the state and may be withdrawn by the state. If economic guarantees (such as security of contract) are made, they are made because the state considers them useful. Such personal rights as freedom of speech, freedom of the press, freedom of assembly, freedom to become a candidate for public office, and freedom of political affiliation, are not recognized under Fascism. Russia, it is true, makes the gesture of guaranteeing some of them, but since the last-named freedom does not exist, the others lose much of their significance. No totalitarian state recognizes the right of the individual to engage freely in political activities.

Another way in which the Fascist states oppose democratic

tendencies is found in their emphasis upon status. Race, sex, and primogeniture are all recognized as reasons for the imposition of special disadvantages or the granting of special advantages. Economic and social classes are not only recognized, but established (e.g., the German class of Bauern or hereditary farmers) when the state sees any reason for such action. The "leveling" tendencies of democracy are scorned by the Fascists.

Russia displayed for some years a tendency to favor the working classes and to suspect not only former capitalists, but "intelligentsia," and in fact all persons who were not laborers or peasants. The present Constitution declares that the class system in the U.S.S.R. is now destroyed. This does not mean, however, that the U.S.S.R. is converted to the democratic view of the rights of individuals.

Popular control of the government is not recognized by any totalitarian state. Russia grants universal suffrage and direct election of representatives, but the place given officially to the Communist Party obviates all possibility of spontaneous popular control. In Germany and Italy the people have sometimes been asked to vote "Yes" or "No" on policies or lists of candidates proposed by the government. The stage has been set, however, in such a way as to ensure an overwhelming victory for the government in every instance. The people are not asked or permitted to exercise any control over the government; but merely to give it, in domestic as well as foreign affairs, the prestige of great victories at the polls.

Majority rule is farcical in all the totalitarian states. Each of these states, it is true, can produce majorities at will; but in each of them political control is officially given to a single party. The penalties of open opposition to the favored party are such as to make a safe majority of votes certain—and perfectly meaningless.

Representative government, though formally established in Russia, operates there under the limitations of the one-party system. In Italy and Germany it cannot be said to operate at all. It is true that certain bodies or councils are selected on a wide basis, to represent various professions, occupations, and interests. Representation of the people, as the result of free

elections in which any policies and any candidates may be brought forward, is, however, impossible.

Not only multiplicity of parties, but the formation of any partisan group to oppose the officially recognized party, is forbidden in all the totalitarian states. Open and unfavorable criticism of the policies of the government, from the viewpoint of a group which hopes to become the government, is as impossible in the U.S.S.R., despite the claims there made of democratic institutions, as in Italy and Germany. The only policies, the only candidates, the only party, in any totalitarian state, must be the policies, the candidates, and the party favored by, and in turn supporting, the group which is in control of the state.

The chief executive in Italy and Germany has no political responsibility to the people or to the representatives of the people. As Leader, as the man who visualizes the ideals and the possibilities of the state more clearly than any other person, the Chief of State cannot be required to submit to the will of the people as, for example, the British Prime Minister does. On the contrary, the Leader informs the people of his views and his motives, and the people are expected to give a hearty assent. In Russia the Chief of State (if the chairman of the Presidium of the Supreme Council may be given this title) is actually a trusted member of the Communist Party. He has no direct responsibility to the people.

The supremacy of the law has suffered severe shocks in all the totalitarian countries. The forms of legality have been observed to a certain extent; that is, both Mussolini and Hitler asked for "enabling acts," and the U.S.S.R. provided itself with a Constitution as soon as possible. But in all three countries partisan activities, secret police, and secret courts were at hand to enable the higher executive and administrative officers to disregard the law and the rules of judicial procedure whenever they chose. The possibility of redress, and particularly of court action by the individual to hold the officers who had injured him within the limits set by law, is non-existent when "the safety of the state"—in other words, the political supremacy of the Leader or his party—is endangered or said to be

endangered. It is true that in minor matters the supremacy of the law is respected even in the totalitarian states.

The separation of powers, and the concomitant checks and balances, are not recognized in the totalitarian states. In the U.S.S.R. the judicial power is to some extent separated from the others, but executive, administrative, and legislative powers are all given to the Supreme Council and its Presidium. In Italy and Germany the "Cabinet" exercises, by means of decree-laws or otherwise, any public power that it chooses. Hitler personally executed a number of persons whom he believed to be acting against him, and later announced that he had been for twenty-four hours the Supreme Court of the Reich.

The faults of each system—the democratic and the totalitarian—are pointed out by those who adhere to the other. Thus, both right and left totalitarians accuse democracy of:

1. A confusion of majority rule, which is in itself meaningless, with the will of the people. Under a system which allows every kind of monied interest to propagandize its own desires in the guise of measures for the general welfare, it is possible to obtain a majority of votes which cannot conceivably represent the true will of the people for the good of the state.

2. Even if the will of the people on any matter should be formed regardless of propaganda and the majority vote should reflect this true will, there is no guarantee that a will so formed, on a basis of individual desires and opinions, will be compatible with even the immediate welfare of the people, much less with the present and future good of the state. The people must be informed by the enlightened few who guide them, as to the measures which they should desire. Experience in the totalitarian countries has shown that the masses welcome this leadership, which is lacking in the democratic system.

3. Recent years have shown that parliamentary government is not capable of handling the important questions of policy and method that face all states today. Parliaments are composed of men who place partisanship high among the virtues—that is, of men who are blind and deaf to the welfare of the state and of the nation. Since these men are without a

common aim, nothing whole and clearcut can be expected from them. All legislation will consist of compromise measures, except on the rare occasions when one party is safely in control. Even the work done by this party (which, by the way, may not be gifted with a clear vision of the good of the state) is likely to be overthrown at the next session of parliament. Hence there can be no order, no direction, no certainty that policies which require years for their execution will ever be carried out. If to this indictment be added the incontrovertible fact that parliaments are slow and uncertain in action, it must be evident that they have no value to the world today.

4. The place of the individual in democracy breeds selfishness and a base self-seeking. Each one desires the adoption of measures which he conceives to be to his own interest; each one looks upon the state as an instrument for the satisfaction of his own selfish desires. There is a lack of noble idealism, of noble objects and ends, of incitements to self-sacrifice and "hard" living. All these needs are fulfilled in a totalitarian state that is unselfishly led by a devoted "élite."

5. In the democratic states there has grown up an almost unrestrained capitalism, shamelessly exploiting the masses. Because each individual conceives the possibility that he may become a capitalist, no intelligent attempt is made by the state (the slave rather than the leader of the people) to organize the economic structure into a permanent form that shall guarantee a living for all. Hence in democratic states an excessive and degenerative interest in material advantage exists side by side with an absolute lack of economic stability and security.

6. The separation of powers and the system of checks and balances, of which democratic states boast, is a factor which weakens the government intolerably. Legislative and administrative powers should logically be in the same hands; since a separation of powers always opens the possibility that the will of the legislature may be defeated by a hostile administration. Under normal circumstances, the courts should be independent in their application of law to individual cases, but it should always be possible for the leaders of the state to see that justice is done summarily in the case of a political crime.

7. Above all, what the democratic states lack is leadership, discipline, and authority. However far they may be from an awareness of this fact, the masses need leadership above all other things—a leadership of authority, a leadership which will impose discipline, a leadership to which men can devote themselves in the certain conviction that they are thus serving their nation and their state with their whole power. Not in self-assertion, but in submission to discipline, in obedience to authority, in devotion to leadership, will men realize their highest selves and most effectively serve the highest good of their nation, as organized in the state.

Advocates of democracy, on the other hand, attack totalitarianism on the following grounds:

1. Totalitarianism in all forms is dangerous to peace. Insistence upon a narrow nationalism, as this is found in both Italy and Germany, is a danger to the world. A nationalism that exalts itself extravagantly by insisting that it represents the highest type of personality and the highest type of civilization, ends in picturing the world at large as slavish and hostile. This view leads, in turn, to the conclusion that the self-styled noble nation should take forcibly such lands as it considers useful to its own expansion. Since both Italy and Germany glorify war as an opportunity to display their characteristic virtues in finest flower, they are a constant menace to the peace of the world.

Russia is an equal menace, at least potentially, because the Communist program includes the fomenting of Communist revolutions in every country. Although the U.S.S.R. has publicly announced that it is not trying to bring about such revolutions, the very fact that its controlling party is a member of the Third International makes this announcement incredible.

2. No totalitarian state displays a proper respect for the individual. Not even in the U.S.S.R., much less in Italy or Germany, is there a sphere of rights in which the individual is secure from interference by the government. There is no true freedom of speech, of the press, or of assembly. A rigid regimentation of opinion is undertaken by every possible means,

and particularly by the organization of children into "patriotic" societies through which the views favored by the government are impressed upon their minds. This regimentation may be made applicable to any field of thought whatever. Germany, for example, now requires the coordination of industry, agriculture, education, art, literature, the social sciences, the physical sciences, and even religious organizations, within a pattern set by the government. The same thing, in a less degree, may be said of Italy and Russia.

Individuals whose personalities are formed under such circumstances suffer from restrictions far more disastrous than the old Chinese foot-binding, far narrower than the requirements of the medieval church. Not only one, but every avenue of free thought and free expression may be closed to those who are so unfortunate as to live in a totalitarian state. Hence if such a state survives, its inhabitants will suffer from a cultural lag which must, as time goes on, place them farther and farther behind peoples among whom free thought and free speech and free discovery and invention flourish. Thus individuals and states alike, under totalitarian governments, will presently be in a situation of relative barbarism; because only free and fully developed individuals can compose a progressive state.

3. A serious fault of all totalitarian states is the lack of intelligent criticism in respect to the essential problems of government. Since it is beyond all possibility that any group of men, however patriotic, self-devoted, and gifted with integrity they might be, could also be omniscient, the only safeguard against ill-considered, extravagant, or mistaken governmental policies is the constant criticism of an opposing group. The assumption that the government in power, because of its sincere devotion to the welfare of the people and of the state, must necessarily act to further that welfare whenever it decides upon a given measure, is wholly unfounded.

4. All totalitarian governments are moving backward, in that they depend upon force rather than consent to retain themselves in power. Furthermore, they are sowing the seeds of their own destruction by civil war, both because no other form of opposition is possible under totalitarianism, and because the

hesitancy which a democratic people feel in regard to resorting to arms is not present in a totalitarian state which rests upon force and glorifies war. The new Constitution of the U.S.S.R. is a step in advance, but the principal support of the state is still force.

5. The interest in material things which has been displayed by the totalitarian states is even greater than that which has been displayed by the democratic states; yet no totalitarian state has been able to bring about general prosperity and economic security. Because of the special circumstance of her agricultural economy and her great need for modern machinery, Russia has come nearer to this goal than Italy or Germany has done, and may soon attain it. As yet, however, it cannot be shown that in any totalitarian state a high standard of living is obtainable by every citizen; nor has it been demonstrated that the economic self-sufficiency which is sought by all totalitarian states is possible. Even if all the economic goals of totalitarianism should be achieved, moreover, this success would not overbalance the faults of the system.

6. The doctrine of the separation of powers is still valid, and its rejection by the totalitarian states demonstrates a lust for power on the part of the leaders, rather than an improvement in the structure of government. The failure to make a complete separation of the judicial power from the executive power is particularly indefensible. No excuses as to the necessity of preventing treasonous attempts by "special" courts under the control of the executive authorities are convincing in view not merely of theory or doctrine, but of the factual record in the totalitarian states. Though but a fraction of this record is known to the public, it is sufficient to show that in any political case, or any case that may be thought to have political repercussions, impartial justice cannot be expected. The very fact that in all the totalitarian states professions are made concerning the freedom of the courts shows that such freedom is either recognized as important, or recognized as important in the eyes of the civilized world. These professions, however, merely add to the horror felt by a believer in free institutions regarding totalitarianism, as he observes that they lose their

significance whenever tested by a critical or vital case. The concentration of all powers of government, including the judicial power in its more important applications, under a single man or a single group, is both reactionary in theory and tyrannical in practice.

7. In all the totalitarian states, the future seems very uncertain. Although it is perfectly possible that the majority of the people in each may be satisfied with the present government, there can be no proof of this until and unless free speech and political opposition may be permitted, a condition which can never be attained without abandoning totalitarian principles. It is consequently impossible to be sure as to the permanent stability of the governmental system. To this uncertainty, Italy and Germany add a further uncertainty as to the future of the government in case of the death of Mussolini or Hitler. Would this event precipitate a revolution? Would the form of government now in effect be possible without the figure about whom it has been developed? Would any other man be acceptable in the place of a man who has been made by deliberate propaganda to appear abler, wiser, nobler, greater, than mankind as a whole? Finally, the future of all totalitarian governments is uncertain because all are based on the assumption that opposition can be prevented from arising, or at most from developing any strength. Since the whole of history shows that this assumption is fallacious, it is safe to prophesy that totalitarianism must either deny its own nature by making a place in the system for political opposition, or, as has been shown above, must face the alternative possibility of destruction by revolution.

The future of democracy and of totalitarianism cannot be foreseen. It seems very likely, however, that in many different countries people now living will be compelled to make a choice between these two systems. It is therefore of the greatest importance that there should be a general understanding of both, in theory and in practice. And here it is necessary to point out the fact that totalitarianism cannot have the advantages of democracy, but that democracy, without sacrificing its own advantages, can obtain all those of totalitarianism. In

other words, totalitarianism cannot offer personal freedom, opportunity for opposition and criticism to become recognized and useful features of the political system, the formation of policy by discussion rather than imposition from above, or an atmosphere of impartial welcome to truth of any kind. Democracy can, and when necessary does, offer every real advantage of totalitarianism, from a strong central government in time of war, to any degree of social control or public ownership in the economic realm which may be desired under a given set of circumstances.

It is often mistakenly claimed that democracy as a political system, and modern industrial capitalism, are necessarily interdependent, and that one must survive or perish with the other. This mistaken idea is due chiefly to the historical coincidence that democracy and capitalism underwent great developments at the same time—the nineteenth century—and in the same places—England and the United States particularly. This coincidence is often used as an argument against allowing any form of economic control to be undertaken in the democratic states, lest the end of laissez-faire economy should be the end of democracy. It is hard to believe that this argument can be taken seriously, since men in Germany, and Russia, and Turkey, and the Far East, made fortunes through modern industry during the nineteenth century, although no stretch of the imagination could make their governments seem democratic.

The great advantage of the democratic state in respect to economics is, that it can at any time take such action as is demanded by the people. If the people desire to continue with private industry and private capitalism, the democratic state can continue to act merely as arbiter. If the people desire state Socialism, the democratic state can act as entrepreneur. If the people desire a mixed system, in which, let us say, all means of transportation and communication, and mining and metallurgy, shall be added to the post office as state enterprises, while private industry continues to operate in all other economic fields, the democratic states can meet this demand. Moreover, if at any time a change from a system once chosen is desired, this can also be brought about by democratic methods.

There are many persons in the United States today who do not understand the possibilities of democracy. Such persons, if they desire to preserve the present economic order, are likely to favor Fascism; or if they desire state Socialism, are likely to suppose that Communism as it has developed in Russia is the only and inevitable means of obtaining it. Nothing could be more disastrous than the payment of such a price as revolution, suppression of individual rights, and the crushing out of free thought, when the democratic political system can be utilized, without the necessity for such sacrifices, to give the people whatever they desire in the realm of economics and in every other realm as well. Our people have wanted, and have obtained, universal suffrage, universal education, free state universities, special governmental aid to agriculture, and various steps toward general social security. Whatever else they desire, they can obtain. No revolution is necessary.

The process will be slower than that of revolution, and the economic pattern will not be so clear cut as that of Fascism or that of Communism. But it will be an economic pattern self-chosen and not imposed. It will be an economic pattern which is not inconsistent with individual development and individual freedom. The rights of the individual will be enlarged rather than narrowed. The government will still be the agent and not the master of the people.

Totalitarianism is the easy way, the simple way, the straight way that leadeth unto destruction. Democracy is difficult and complex and confusing, like life itself. But no peoples who have experienced democracy (for Germany never had more than its outline) have yet submitted to totalitarianism.

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